

New Jersey Department of Environmental Protection
Division of Water Quality
Bureau of Nonpoint Pollution Control

RESPONSE TO COMMENTS

The New Jersey Department of Environmental Protection (the Department or NJDEP) issued a Draft Renewal of the Tier A MS4 New Jersey Pollutant Discharge Elimination System (NJPDES) General Permit No. NJ0141852 (Tier A MS4 NJPDES permit) as well as the Tier B MS4 NJPDES General Permit No. NJ0141861 (Tier B MS4 NJPDES permit) on February 15, 2017. The Tier A MS4 NJPDES permit authorizes the discharge of stormwater from municipal separate storm sewer systems (MS4s) owned or operated by Tier A Municipalities in the State of New Jersey. The Tier B MS4 permit authorizes the discharge of stormwater from MS4s owned or operated by Tier B Municipalities in the State of New Jersey.

As part of the issuance of the draft Tier A and Tier B MS4 NJPDES permits on February 15, 2017, complete copies of both permits and supporting documents were posted at www.nj.gov/dep/dwq. Notice of the draft permit actions was included in the *Press of Atlantic City* as published on February 17, 2017; the *Courier-Post* as published on February 17, 2017; the *Star-Ledger* as published on February 16, 2017; and in the Department's February 15, 2017 *DEP Bulletin*. A public hearing was held on March 22, 2017 at the Department's offices in Trenton, NJ. The public comment period closed on April 3, 2017.

The purpose of the draft permit comment period was to solicit input prior to the issuance of a decision on any final permit. During the public comment period the Department accepted written comments from numerous parties and individuals on both permits. The Department also accepted oral testimony as comments since the public hearings were recorded by a stenographer and transcribed. Pursuant to N.J.A.C. 7:14A-15.15 and 15.16, the Department is required to respond to all significant and timely comments upon issuance of the final document. The permittee and all individuals and entities who submitted written comments will receive notice of the Department's final decision. These subject final permit actions serve to renew the 2009 Tier A and Tier B MS4 NJPDES permits which expired on February 28, 2014 but were administratively continued under N.J.A.C. 7:14A-2.8 pending these final actions.

The administrative record is available for review and is on file at the offices of the Department, located at 401 East State Street, Trenton, New Jersey. It is available for inspection, by appointment, Monday through Friday, between 8:30 A.M. and 4:00 P.M. Appointment for inspection may be requested through the Open Public Records Act (OPRA) office. Details are available online at www.nj.gov/dep/opra, or by calling (609) 341-3121. The administrative record includes, but is not limited to, copies of all written comments, testimony given at the public hearings, and any documents identified in this Response to Comments document consistent with N.J.A.C. 7:14A-15.17.

The following persons commented during the public comment period as arranged alphabetically:

Person Commenting	Affiliation/Title	Commenter Number
April Banach	Self	1
Leslie Boen	Self	2
Michael F. Cerra	Assistant Executive Director and Director of Government Affairs NJ League of Municipalities	3
Kimberli Craft, PE, CME, President	New Jersey Society of Municipal Engineers	4
Honorable Maria DiGiovanni	Mayor, Town of Hackettstown	5
Jennifer Duckworth ¹	Millburn Resident	6
Kristen Errickson	Self	7
Jamie Evanini	Pennington Resident	8
Jacob A. Feinberg ²	Self	9
Paul D. Fox	Harding Township Engineer	10
Michael Gelin, PE, CME	Municipal Engineer, Township of Woodbridge	11
Deborah Gregory-Fink	Self	12
Francis A. Guzik, PE, CME	Township Engineer, West Windsor Director of Community Development	13
Dr. L. Stanton Hales, Jr.	Director, Barnegat Bay Partnership	14
Becky Hammer ¹	Staff Attorney, Water Program, Natural Resources Defense Council On behalf of**: American Littoral Society Clean Ocean Action Delaware Riverkeeper Network Hackensack Riverkeeper New Jersey Environmental Lobby NY/NJ Baykeeper Pinelands Preservation Alliance Stony Brook-Millstone Watershed Association	15
Scott W. Hatfield, PE, CME	Burlington Township Municipal Engineer, Stormwater Program Coordinator	16
Richard S. Krawczun	Municipal Manager, Lawrence Township	17
Wayne Jackson	Acting Chief, Clean Water Regulatory Branch, United States Environmental Protection Agency, Region 2	18
Judith MacLaury	Lawrenceville Resident	19
Honorable Thomas M. McKay	Mayor, Lopatcong Township	20
Virginia Michelin	Principal Environmental Planner, Morris County Department of Planning and Public Works	21
William P. Minervini ¹	Self	22
Honorable Sam Morris	Mayor, Mine Hill Township	23
Camille Perrin	Self	24
Michael L. Pisauro, Jr. ¹	Policy Director, New Jersey Council of Watershed Associations	25
Gerald R. Savo	Bayonne Native	26

Person Commenting	Affiliation/Title	Commenter Number
William Simmons	Middletown Resident	27
Tara Sniezek	Self	28
Deanna Stockton, PE, CME	Princeton Municipal Engineer	29
Marcia Taraschi	Self	30
Jim Tobias	Self	31
Louisa Walpin	Self	32
Britta Wenzel ³	Executive Director, Save Barnegat Bay	33

Footnotes for Table

- 1 Provided testimony at public hearing on March 22, 2017.
- 2 Commenter 9 requests that the Department adopt the MS4 permit recommendations made by Commenter 15.
- 3 Commenter 33 expresses support for the statements of Commenter 15.

The Department has summarized the written comments and public testimony received on the draft Tier A and Tier B MS4 NJPDES permits in this response to comments document. Pursuant to N.J.A.C. 7:14A-15.16(a)3, the Department has addressed all comments that are relevant to the scope of the NJPDES permits. The Department has identified the commenters by their respective commenter numbers. If a person submitted written comments as well as testimony at the public hearing, then that person was assigned the same comment number for the hearing and/or written submittal. The Department has provided responses to these comments as well as an explanation of any changes made to the final permit. A list of acronyms that are used throughout this document has been included at the end of this Response to Comments document. To highlight changes to specific permit language throughout this document, deletions are shown with strikethrough and additions are shown with underline.

This response to comments document addresses the comments submitted on the Tier A and Tier B MS4 NJPDES permits. The Tier A and Tier B MS4 NJPDES permits are generally identical in content except that the Tier B MS4 NJPDES permit has only two of the six Statewide Basic Requirements (SBRs) namely public education as well as post-construction stormwater management for new development and redevelopment (which includes private stormwater facility operation and maintenance). However, the Department has differentiated any comments that pertain specifically to the Tier B MS4 NJPDES permit conditions in its summary of the comment. Where specific changes to permit language were suggested by the commenter, the Department generally indicates if changes have been made to the final permits as a result of the comment.

To the best extent practicable, the Department has grouped the comments according to either similar issues or according to the relevant portions of the permits. Organization of the document is as follows with significant sections of the permit noted:

Organization of Response to Comments

General Comments

- Overall Permit Structure and Requirements
- Pollution from Stormwater
- Green Infrastructure
- Clean Water Act and Stormwater Monitoring
- Impact of Permit on Municipalities
- Miscellaneous Comments

Fact Sheet

Part I General Requirements: NJPDES

Part II General Requirements: Discharge Categories

Part III Recordkeeping and Reporting

Part IV Specific Requirements: Notes and definitions

Part IV Specific Requirements

Part IV.A Permit Overview

Part IV.B Statewide Basic Requirements (SBRs) and Associated Conditions

Part IV.B.1 Minimum Standards for Public Involvement and Participation

Part IV.B.2 Minimum Standards for Local Public Education and Outreach

Part IV.B.3 Minimum Standards for Construction Site Stormwater Runoff

Part IV.B.4 Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment

Part IV.B.5 Minimum Standards for Pollution Prevention / Good Housekeeping for Municipal Operators

Part IV.B.6 Minimum Standards for Outfall Pipe Mapping, and Illicit Discharge and Scouring Detection and Control

Part IV.C Other Control Measures

Part IV.C.1 Minimum Standards for Stormwater Facilities Maintenance

Part IV.C.2 Minimum Standards for Total Maximum Daily Load (TMDL) Information

Part IV.D Additional Measures

Part IV.E Optional Measures

Part IV.F Stormwater Pollution Prevention Plan

Part IV.G Annual Report and Certification

General Comments

1. **Comment:** Commenter 15 recognizes the efforts of the Department and acknowledges that certain provisions in the draft Tier A MS4 NJPDES permit have been revised in order to improve overall specificity and clarity. Commenter 15 agrees that many of these revisions represent significant improvements over the terms of the previous 2009 Tier A MS4 NJPDES permit. In particular, Commenter 15 supports the reorganization and clarification of the permit's structure; the enhanced public education and outreach requirements; and the focus on municipal enforcement of the post-construction development regulations. Commenter 15 believes that these revisions will improve permittee understanding and increase rates of compliance.

Commenter 15 expresses support for the Department's efforts to help municipalities better understand their obligations by reorganizing and streamlining key permit requirements. In the past, permit noncompliance has resulted from permittees' failure to understand exactly what was required of them (See the audit reports for Hopewell and Toms River, cited *infra*, for examples.). The revisions that the Department has proposed to the permit's organization and wording will help to avoid this problem, specifically:

- Throughout, permit language has been simplified, and each requirement is broken out into its own sub-paragraph, significantly improving the readability of the permit's terms.
- The new summary in the section labeled "Permit Overview" consolidates the permit's major requirements into one overarching list. This will help to ensure that obligations are not inadvertently forgotten or skipped over.
- The Statewide Basic Requirements (SBRs) have been reordered to track the order in which they appear in EPA's National Pollutant Discharge Elimination System (NPDES) regulations, which should help to improve understanding of the relationship between federal rules and the permit's requirements.
- The Public Participation SBR now specifies the state public participation laws that apply to MS4s. This should improve compliance compared to the 2009 permit, which did not list any applicable laws or regulations.

Commenter 15 notes that SBR requirements that overlap or otherwise relate to one another have been helpfully consolidated. For example, all requirements that apply to municipal operations (including waste disposal ordinances, street sweeping, storm drain retrofitting, employee training, and maintenance yard operations) have all been consolidated into the Good Housekeeping SBR. Likewise, actions that relate to illicit discharge detection and elimination, such as outfall pipe mapping and stream scouring remediation, have been moved into the illicit discharge detection and elimination SBR section. This consolidation of related permit requirements could help permittees better structure their programs and carry out their duties more efficiently. [15]

Response 1: As noted in this comment and as described throughout the Response to Comments document, the Department has purposefully improved the Tier A and B MS4 NJPDES permits in an effort to promote clarity and to strengthen permit conditions as compared to the 2009 MS4 Tier A and B NJPDES permits. The Department strived to ensure that permit conditions are well organized and easy to understand and expects that this will translate to increased rates of compliance. The Department appreciates the acknowledgement of these improvements as described in this comment.

It is worth noting that these improvements were largely the result of a robust public outreach process. In an effort to improve overall effectiveness of the NJPDES permit renewal process in the development of permit conditions, the Department conducted extensive outreach for stakeholders in the preparation of the renewal permits as described on page 9 of the Fact Sheet for the Tier A MS4 NJPDES permit and on page 7 of the Fact Sheet for the Tier B MS4 NJPDES

permit. This included small group workshops with municipal permittees where the Department explained proposed permit conditions, answered questions, and gathered feedback. Notification of such workshops was provided via e-mail invitation to all Stormwater Coordinators and mayors in New Jersey's permitted municipalities. This extensive outreach was critical to inform the Department as to which permit conditions were clear as well as to understand the resources available to Tier A and B Municipalities. These workshops were well attended and the Department maintains that the extensive input received from stakeholders has translated into better regulatory documents. Subsequent to the public outreach process, the Department published a preliminary draft version of the Tier A and Tier B MS4 NJPDES permits to allow stakeholders the opportunity to provide additional comments on permit conditions. A listing of comments on the preliminary draft is included in the Contents of the Administrative Record as contained in the Fact Sheets for the Tier A and Tier B NJPDES permits. The Department carefully considered the preliminary draft permit comments prior to releasing the draft Tier A and Tier B MS4 NJPDES permits. The Department acknowledges that Commenter 15 submitted comments during the preliminary draft process.

Due in part to information gathered through the public outreach process, the Department created additional resources, namely guidance documents, checklists, and training modules, to assist with compliance with the expired but administratively extended 2009 Tier A MS4 NJPDES permit as well as to augment compliance with the renewed Tier A and Tier B MS4 NJPDES permits. The Department maintains that these resources will assist municipalities in implementing compliant MS4 stormwater programs which will positively impact water quality. Resources for Tier A Municipalities are available at www.nj.gov/dep/dwq/tier_a.htm whereas resources for Tier B Municipalities are at www.nj.gov/dep/dwq/tier_b.htm. A stormwater index is available at www.state.nj.us/dep/dwq/fd.htm which guides stormwater management professionals, permittees and the general public to the Department's stormwater related technical information, guidance materials, educational resources, forms, and applications.

The Department appreciates the recognition by Commenter 15 of these improved permit conditions which were the result of significant and robust efforts by the Department as well as stakeholders. The Department agrees that efforts to help municipalities to comply will result in improved water quality.

2. **Comment:** Commenter 15 states that the insufficiency of the 2009 Tier A and Tier B MS4 NJPDES permits led these organizations to submit a petition, over three years ago, asking the Department to strengthen permit requirements. That petition detailed the legal shortcomings in the permits that undercut their efficacy as clean water regulatory tools. Commenter 15 states that the petition documented many instances of the permits' requirements not even being routinely enforced and the Department never officially responded to the petition, either to grant or to deny it.

Commenter 15 alleges that during that time the Department abdicated its responsibility to implement robust and legally sound water pollution controls in other contexts. Commenter 15 states the Department enacted revisions to the State's Flood Hazard Area Control Rules that significantly undercut protections for riparian zones and high quality waters. In response to

considerable public outcry and the New Jersey Legislature's institution of an override, pursuant to the New Jersey Constitution, the Department proposed additional changes to the Flood Hazard Rules on June 20, 2016. Commenter 15 alleges that those changes, while an improvement, are not sufficient to address the water quality impacts allowed by the 2015 rules. In November 2016, the Department adopted new Water Quality Management Planning regulations that the commenter believes are damaging to water quality protection because they allow for increased development and associated water quality impacts from sewers, wastewater treatment plants, and runoff in coastal areas and areas where wastewater capacity is undeveloped or already "built out." Commenter 15 states that although the Department announced in 2014 it would update and modernize its stormwater control standards for development sites, that process has stalled, without any regulatory revisions actually proposed. Commenter 15 states that altogether, this lack of movement on clean water protections has directly and indirectly resulted in the continued impairment of New Jersey's rivers, streams, lakes, and bays.

Commenter 15 states that since the Department is finally renewing the expired 2009 MS4 NJPDES permits, it must take advantage of this critical opportunity to protect and restore New Jersey waters by incorporating stronger requirements that hold municipalities accountable for reducing their discharges of pollution. Commenter 15 states that while the draft permits released for comment do include certain provisions that improve upon the requirements of the 2009 permits, they do not go far enough to curb the polluted runoff that continues to degrade New Jersey's natural resources.

Commenter 15 believes both permits must be significantly strengthened in order to address the ongoing harms of stormwater runoff on New Jersey's waterways. As an appendix to the comment document, Commenter 15 provides a document entitled "Example Permit Conditions from Other States for NJDEP to Consider When Revising the Draft Permits" which provides examples of other state MS4 permit conditions regarding the following requirements: Water Quality Based Effluent Limitations (WQBELs), Monitoring, Post Construction Standards for Development and Stormwater Facility Maintenance. [15]

Response 2: As described in **Response 1**, the Department maintains that it has incorporated extensive improvements to the Tier A and Tier B MS4 NJPDES permits. In addition to improved permit language, new requirements, such as enhanced training, improved recordkeeping for stormwater facility maintenance, expansion of Local Public Education and Outreach, expanded requirements for municipal maintenance yards, and total maximum daily load (TMDL) requirements, are intended to be an iterative step and reasonable progress towards reducing pollutants to the maximum extent practicable. The Department considered a variety of information in developing permit terms during the stakeholder process but also considered information from other states. Most notably, the Department considered the Environmental Protection Agency's (EPA) MS4 Permit Improvement Guide (EPA 833-R-10-001) where the primary purpose of this guide is to assist NPDES permit writers in strengthening MS4 stormwater permits.

Independent of, but related to the MS4 NJPDES permit renewal process, the Department is engaged in an assessment of and improvements to its municipal stormwater program which

includes efforts to better gauge the effectiveness and enforcement of the MS4 program. These efforts include development of a new Supplemental Questionnaire to the annual report form as well as a stormwater audit process intended to provide focused compliance assistance to municipalities. These efforts will provide a platform for discussion between municipalities and Department staff to foster an adaptive approach to municipal stormwater management planning. Stormwater materials are posted at www.nj.gov/dep/dwq/msrp_home.htm and www.nj.gov/dep/dwq/msrp-archive.htm.

The Department acknowledges that Commenter 15 expresses concern about the Flood Hazard Area Control Act, Stormwater Management rules, and Water Quality Management Planning rules in this comment. While these rules are related to the Tier A and Tier B MS4 NJPDES permits, these rules are not the focus of public comment for the Tier A and Tier B MS4 NJPDES permits. Specifically, a separate public process occurred as part of the public notice for each of these rules.

3. **Comment:** Many commenters state that New Jersey's current stormwater rules are not sufficiently protecting our waterways and beaches. These commenters emphasize the importance of beaches, rivers and lakes in New Jersey and express concern that people may leave New Jersey for recreation and vacations because the standards are not attained. [1] [2] [7] [8] [19] [28] [30]
4. **Comment:** Many commenters cite concern about stormwater pollution in general and express concern about the quality of stormwater flowing into our waterways and beaches. [1] [2] [7] [8] [12] [19] [28] [32]
5. **Comment:** Commenter 8 states that the list of impaired waters in New Jersey outnumbers the good waters in the Water Quality Assessment Report and wants to dramatically improve the numbers of "good" waters. [8]
6. **Comment:** Commenter 9 states that although New Jersey's history and legacy are intimately tied to fresh and clean water, almost every single waterway in New Jersey is too polluted to meet clean water standards. [9]
7. **Comment:** Commenter 31 suggests that the stormwater regulations be strengthened. The commenter states he sees the results of pollutant runoff at a lake in Matawan, namely fish kills, algae, weed blooms, and unswimmable conditions. [31]
8. **Comment:** Commenter 33 states that stormwater continues to be the most significant source of pollution in Barnegat Bay. The commenter strongly encourages the Department to strengthen these permits to reduce pollutant loadings into impaired waters. [33]
9. **Comment:** Commenter 24 states that beaches are cleaner and the water is clearer as compared to previous years when beaches were dirty and water was polluted. The commenter states she has recently observed dolphins, skates, and fish in the water and is delighted to see that the beaches are swimmable. [24]

10. **Comment:** Commenter 15 explains that municipal stormwater has been regulated in New Jersey ever since the Department issued its first generation MS4 permits in 2004. When EPA instituted the small MS4 permitting program, it noted that the purpose of such permits was to “significantly reduce pollutants in urban storm water” and to “protect water quality.” (National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,734, Dec. 8, 1999). The commenter states EPA determined that small MS4s in particular needed to be regulated by permit because these “storm water sources, when unregulated, tend to cause significant adverse water quality impacts.” (Id. at 68,734). Despite 12 years of MS4 permitting in New Jersey, the commenter alleges the harmful effects of runoff on water quality continue to grow. Commenter 15 explains that the Department’s Assistant Commissioner for Water Resource Management stated, “Today, stormwater pollution remains our biggest water-quality challenge.” (NorthJersey.com, “Water Quality a Mixed Bag for New Jersey, Report Says,” Feb. 27, 2017). Additionally, Commenter 15 states that the Department’s own water quality data and reporting prove the State’s MS4 permits have proven insufficient to protect local waterways.

Commenter 15 states that the Department’s Draft 2014 Integrated Water Quality Assessment Report (www.state.nj.us/dep/wms/bears/2014_integrated_report.htm) demonstrates serious water quality impairments in New Jersey, as over 98% of the waters in the state fail to fully meet water quality standards. In particular, analysis contained in the report “shows median concentrations of [total dissolved solids], chlorides, dissolved nitrate plus nitrite and total nitrogen increased statewide during the assessment period.” Likewise, statewide sampling showed “a slight negative trend toward impaired conditions,” with one of the strongest trends being “the decline of non-impaired (‘Excellent’ and ‘Good’) sites.”

A significant contributor to the degradation of New Jersey’s waters is stormwater runoff. Sublists 4 and 5 of New Jersey’s Draft 2014 Integrated List of Waters identify the sources of New Jersey’s water quality impairments. Urban runoff and stormwater pollution are contributing sources to more than one-third of New Jersey’s impairments where “Urban Runoff/Storm Sewers” is listed as a source of impairment for 942 of the total 2,560 assessment unit/pollutant combinations identified on that list. Note that based on Appendix B of that report 117 of these assessment unit/pollutant combinations were added to the list after the 2009 MS4 permits were issued. However, only 1,895 of the 2,560 assessment unit/pollutant combinations on the list have any source identified at all, meaning that approximately one-half (942 out of 1,895) of attributed impairments are caused by stormwater. Commenter 15 states that EPA’s summary of New Jersey’s water quality assessment confirms the negative impact of urban runoff on the State’s waterways, listing it as a source of impairment for more New Jersey waters than any other source. According to that assessment, urban stormwater is causing impairments in 13,093.9 miles of rivers (over sixty-eight percent of river miles), 26,865.9 acres of lakes, reservoirs, and ponds, 193.7 square miles of bays and estuaries, and 371.9 square miles of ocean and near coastal waters.

In 2011, the Barnegat Bay Partnership released the State of the Bay Report documenting the eutrophic conditions in the Bay. This report found that eutrophication, which is an increase in

the rate of supply of organic matter (nutrients) into an ecosystem leading to low oxygen levels, is “one of the leading issues facing Barnegat Bay today.” Commenter 15 states that the Partnership’s report also found eutrophication is “overwhelmingly” driven by increases in nitrogen from runoff pollution generated by development in the watershed and stormwater is contributing pathogens to the Bay impairing recreational uses like swimming. After performing an original analysis of recent beach water monitoring, the report concluded, “Non-point source pollution delivered via stormwater is the primary source of contamination at [Bay] beaches.”

Commenter 15 continues by stating that the condition of the Navesink River provides another example of stormwater runoff’s continuing impact on New Jersey’s waterways. The Navesink has one of the highest water quality designations in the state (SE1 – Saline Estuarine waters with a Category 1 designation for outstanding recreation and shellfish resources) and harbors one of the last remaining direct shellfish harvesting areas in the region. However, Commenter 15 states that water quality is deteriorating since the Navesink River does not consistently meet fecal coliform standards, especially during and immediately after rain events, clearly tying this bacterial impairment to stormwater pollution. Most recently, in 2016, the Department downgraded 565.5 acres of the river to “prohibited” for shellfish harvesting. Other recreational and “direct contact” activities such as swimming and paddling are also “unsafe” after a rain event.

Commenter 15 asserts that this information, together with the State’s own impairment data, proves New Jersey’s current 2009 MS4 permits are not strong enough to prevent stormwater from degrading water quality throughout the state, much less improve conditions in waterways that are already impaired. [15]

Response 3-10: The Department acknowledges there are impaired waterways in New Jersey and that stormwater can contribute to waterbody impairments. The biennial Statewide Water Quality Inventory Report or "305(b) Report" must include the status of principal waters in New Jersey in terms of overall water quality and support of designated uses, as well as strategies to maintain and improve water quality. The 305(b) reports are used by Congress and the EPA to establish program priorities and funding for federal and state water resource management programs. The biennial List of Water Quality Limited Waters or "303(d) List" identifies waters that are not attaining designated uses (i.e., impaired) because they do not meet surface water quality standards. See www.nj.gov/dep/wms/bears/assessment.htm for additional information.

The Department acknowledges that New Jersey is a densely populated state with more than 8 million residents. The vast number of visitors and residents currently living in New Jersey, combined with their activities, can contribute to “nonpoint source” pollution. Stormwater runoff flows from rooftops, over paved areas, over bare soil, and through sloped vegetated areas while picking up a variety of sediments and pollutants on its way. The quantity and quality of runoff is affected by many factors, including the season, local meteorology, geography, topography, land cover, and the activities which lie in the path of the flow. Impervious surfaces, such as rooftops and pavement, can increase the probability of downstream erosion and flooding. The quality of the stormwater runoff depends on the associated pollutants within the flow path of the stormwater. Although the amount of pollutants from a single site may seem unimportant, the

combined concentrations of pollutants running off of many sites can negatively affect waterbodies.

Stormwater runoff is commonly transported through MS4s before discharging into local waterbodies. In an effort to prevent harmful pollutants from being washed or transported into an MS4, federal stormwater regulations require MS4 operators to obtain a NPDES permit and implement a stormwater program. State stormwater regulations also require MS4 operators to obtain a NJPDES permit and develop a stormwater program. This subject permit renewal is a Comprehensive General Permit (under 40 CFR 122.28) which serves to authorize MS4 stormwater discharges from New Jersey Tier A and Tier B municipalities and requires the municipalities to develop a stormwater program.

The Tier A MS4 NJPDES permit includes requirements that pertain to public involvement and participation, local public education and outreach, post-construction stormwater management for new development and redevelopment, pollution prevention and good housekeeping for municipal operators, illicit discharge and scouring detection and control, and requirements to ensure public and private stormwater facility operation and maintenance. The Tier B MS4 NJPDES permit contains a subset of the Tier A MS4 NJPDES permit provisions including requirements that pertain to local public education and outreach, post-construction stormwater management for new development and redevelopment, and requirements to ensure public and private stormwater facility operation and maintenance.

The regulation of stormwater runoff through the Tier A and Tier B MS4 NJPDES permit renewals is intended to continue to provide substantial water quality benefits to assist in addressing water quality impairments. This includes an emphasis on proper operation and maintenance of stormwater facilities to control nutrients, pathogens, solid and floatable materials, and other pollutants as well as an emphasis on the reduction of stormwater runoff quantity. The Department maintains that the conditions of this renewed permit, if implemented correctly, will work towards improving water quality and help to address water quality impairments.

No changes have been made to the final permit as a result of these comments.

11. **Comment:** Many commenters express general support for green infrastructure. These commenters state that green infrastructure would help improve waterways and is especially important in such a densely populated state. These commenters state that residents are paying green infrastructure experts like Rutgers through tax dollars and the Department should consider their advice. [1] [2] [7] [8] [19] [28] [31]
12. **Comment:** Many commenters ask that the Department improve stormwater standards and/or regulations through green infrastructure best practices, including planter or tree boxes, rain gardens, permeable pavements and vegetated swales to soak up stormwater. [2] [7] [8] [19] [28] [30] [32]
13. **Comment:** Commenter 9 asks the Department to adopt tougher regulations for permits for municipal stormwater and incorporate green infrastructure as part of the solution. [9]

Response 11-13: Green Infrastructure (GI) generally refers to methods of stormwater management that reduce wet weather/stormwater volume or flow or changes the characteristics of the flow into combined or separate sanitary sewers, storm sewers, or surface waters by allowing the stormwater to infiltrate, be treated by vegetation or soils; or be stored for reuse. While the design of a municipality's stormwater program is up to the municipality, the Department agrees that GI can be integral to a successful stormwater management program. As a result, the Department has been proactive in providing tools and support practices for communities to promote GI for stormwater management. The Department's website at www.nj.gov/dep/gi is tailored towards GI and includes a wide spectrum of information targeted specifically for home owners, businesses, developers, municipalities, counties and educators.

The Department also agrees that there are agencies outside the Department that can be instrumental in assisting and implementing a successful stormwater program. Note that the website at www.nj.gov/dep/gi includes links to other organizations that promote GI, including Rutgers Cooperative Extension.

The Department is currently in the process of stakeholdering potential changes to the Stormwater Management Rules at N.J.A.C. 7:8, which would require the use of GI. However, while the NJPDES permits require municipalities to enforce the requirements within the Stormwater Management Rules at N.J.A.C. 7:8, the specific requirements of those rules are not contained within the permit.

No changes have been made to the final permit as a result of these comments.

14. **Comment:** Commenter 26 expresses concern regarding the outdated, outmoded combined storm/sewer overflow system utilized by the City of Bayonne which results in the continued degradation of water quality. Commenter 26 requests an accelerated timeline for the separation of stormwater from wastewater within the City of Bayonne sewer system. [26]

Response 14: The Bayonne City Municipal Utility Authority (MUA) combined sewer system is regulated under NJPDES Permit Number NJ0109240 which is not the subject of public comment and notice for the Tier A and Tier B MS4 NJPDES permits as addressed in this Response to Comments document. A copy of Bayonne City MUA's NJPDES Permit Number NJ0109240, as well as a discussion of the Department's commitment to working with CSO communities to reduce or eliminate CSOs, can be found at www.nj.gov/dep/dwq/cso.htm.

No changes have been made to the final permit as a result of these comments.

15. **Comment:** Commenter 25 states that the objective of the Clean Water Act (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). New Jersey's Water Pollution Control Act installs this CWA requirement in State law at N.J.S.A. 58:10A-2. Commenter 25 states that the CWA's MS4 requires the system to "reduce the discharge of pollutants to the maximum extent practicable . . ." 33 U.S.C. 1342(p)(3)(B)(iii). Commenter 25 states that based on the draft 2014 Integrated Report, the dirtiest water is

improving and our cleaner waters are degrading. As reported, 60% of the pollution is the result of non-point source pollution. Commenter 25 questions if the Department evaluated the effectiveness of the 2009 permit and its implementation on current water quality conditions. Under federal regulations an evaluation of the effectiveness of the permit is required and, if designated uses are not achieved, the Department must modify the permit to address deficiencies (40 CFR 122.34).

Commenter 25 further states that the permit does not require any end-of-pipe or outfall monitoring to determine the quality and types of pollutants discharged. 33 U.S.C. 1342(a)(2). Federal regulations require the discharge from stormwater outfalls to be monitored. 40 CFR 122.44(i). Without monitoring, it is impossible to determine whether stormwater discharges are meeting water quality standards and whether the installed Best Management Practices (BMPs) are functioning as anticipated. Further, a permittee or the Department cannot adjust BMPs or standards to assist in improving water quality.

Commenter 25 states that the absence of mandatory requirements to implement TMDLs, reduce pollution loading to impaired waters, or to monitor the discharge into Waters of New Jersey is troubling as the absence of monitoring makes it impossible to determine whether the targeted reductions are achieved. This also violates New Jersey's requirement that all NJPDES permits, including MS4 permits, include water quality based limitations. N.J.A.C. 7:14A-13.2(a)(2). Commenter 25 states that the Integrated Water Quality Reports lists many of New Jersey's waters as impaired yet not all of those waters have an approved TMDL. The Clean Water Act protects impaired waters even in the absence of a TMDL. Commenter 25 expresses concern that the permit does not contain a requirement for the permittee to address waters that are impaired but do not have an approved TMDL. [25]

16. **Comment:** Commenter 15 states that the draft Tier A MS4 NJPDES permit falls short of federal regulations and EPA requirements because it fails to include any monitoring obligations. In connection with the water quality based effluent limitations that must be integrated into the permit, Commenter 15 states that the Department must also incorporate monitoring requirements to ensure compliance with those limits. Under the Clean Water Act, all NPDES permits are required to contain monitoring provisions sufficient to assure compliance with permit conditions, “including conditions on data and information collection, reporting, and such other requirements as [the permitting authority] deems appropriate” (33 U.S.C. 1342(a)(2)). Specifically, the Act states:

“Whenever required to carry out the objective of this chapter, including but not limited to...(2) determining whether any person is in violation of any ... effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance...(A) the Administrator shall require the owner or operator of any point source to...(iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods)...as he may reasonably require” (33 U.S.C. § 1318(a)).

Accordingly, federal regulations at 40 CFR 122.44(d) (see also Sawyer's Memorandum) require all NPDES permits to contain monitoring requirements "to assure compliance with permit limitations." Stated differently, these monitoring requirements must be of the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity" (40 CFR 122.48(b)).

Commenter 15 continues by stating that in line with these federal requirements, New Jersey regulations at N.J.A.C. 7:14A-24.9(a) state, "For small [MS4s], the permittee shall comply with the requirements for evaluation, recordkeeping, and reporting in N.J.A.C. 7:14A-25.6(j) or 25.8(i)..." The requirements in N.J.A.C. 7:14A-11.2(a)(2), in turn, are: "to assure compliance with permit limitations, a permittee shall be required to monitor: i. The mass, or other measurement specified in the permit, for each pollutant limited in the permit; ii. The volume of effluent discharged from each outfall; iii. Other measurements as appropriate..."

Commenter 15 attached EPA's 2014 review of New Jersey's MS4 permits, as Exhibit B to its comments (EPA, New Jersey Department of Environmental Protection MS4 General Stormwater Permit Review (2014) (hereinafter "EPA Permit Review"). Accordingly, Commenter 15 states that when EPA Region 2 reviewed the current 2009 permit it directed the Department to incorporate monitoring requirements:

"NJDEP is required to include monitoring requirements for stormwater WLA [wasteload allocation] implementation. . . . NJDEP should include monitoring requirements to assess WLA implementation progress. Monitoring could include BMP effectiveness monitoring, outfall monitoring, or receiving water monitoring or NJDEP could require that MS4s demonstrate compliance with effluent limit BMPs through tracking of BMP implementation and modeling studies. The monitoring conducted should demonstrate the MS4's compliance in meeting the WLA." (EPA Permit Review at 7).

Commenter 15 states that the draft permit's only reference to monitoring is a cross-reference to N.J.A.C. 7:14A-6.5, a regulation which only specifies procedures and methods when monitoring is actually required by a permit. Monitoring of end-of-pipe discharges and/or receiving waters is the only way to know whether permittees' stormwater management programs are working. Courts have recognized that self-monitoring by permittees is essential to effective enforcement of the Clean Water Act and achievement of the law's environmental protection objectives. (*Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491-91 (9th Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988), reinstated, 853 F.2d 667 (9th Cir. 1988) (discussing the statutory structure, federal regulations, and legislative history)). "The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements." (*Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001)). "Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance." (*Champion Int'l Corp. v. North Carolina*, 648 F.Supp. 1390, 1395 (W.D.N.C. 1986), vacated on other grounds, 850 F.2d 182 (4th Cir. 1988))

Commenter 15 states that when the Department incorporates water quality based effluent limitations into the permit, it must also require that permittees conduct representative monitoring

of receiving waters sufficient to determine the status of compliance with such limits, including TMDL WLAs. Other states around the country include monitoring requirements in their small MS4 general permits, which would be feasible for the Department to include in New Jersey as well. [15]

Response 15-16: The Department will be able to assess and evaluate compliance with the effectiveness of permit conditions through tracking of measurable goals implementing BMPs, on-site audits conducted by Department staff, the submission of annual reports, and the existing ambient monitoring program. The Department acknowledges that end-of-pipe monitoring for stormwater outfalls is not a requirement of the MS4 NJPDES permits at this time. This is allowable under state and federal regulations. EPA indicated as part of the 1999 Phase II rulemaking that it “does not encourage requirements for ‘end-of-pipe’ monitoring for regulated small MS4s. Rather EPA encourages permitting authorities to carefully examine existing ambient water quality and assess data needs.” (64 FR at 68769). More recently, EPA has affirmed that its requirement that permit conditions be “measurable” does not automatically necessitate water quality monitoring or end-of-pipe monitoring. (81 Fed. Reg. 89320, 89336). As stated on page 13 of the Tier A MS4 permit Fact Sheet:

“The Department is not requiring numeric effluent limitations in this draft Tier A MS4 NJPDES permit which is consistent with the federal Clean Water Act and EPA Phase II regulations at 40 CFR Part 122. The federal Clean Water Act defines the term “effluent limit” broadly to include BMPs that would restrict the quantities, rates, and concentrations of constituents within a discharge. Thus, BMPs provide treatment pursuant to the Department’s authority under the Clean Water Act with the goal of meeting water quality standards.”

The Clean Water Act at Section 402(p)(3)(iii) states that permits for discharges from municipal storm sewers “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” As per Section 402(a)(2) of the Clean Water Act, NPDES permits are required to contain monitoring provisions sufficient to assure compliance with permit conditions, “including conditions on data and information collection, reporting, and such other requirements as [the permitting authority] deems appropriate.” In sum, the Clean Water Act provides flexibility in the forms of monitoring that the Department can deem appropriate.

The 1999 Phase II federal regulation issued by EPA at 40 CFR 122.34 requires regulated small MS4s in urbanized areas to obtain NPDES permit coverage for their stormwater discharges. As detailed in the preamble to the EPA Phase II rule, the requirements for MS4s are anticipated to be iterative and adaptive. Specifically, the maximum extent practicable (MEP) standard should continually adapt to current conditions and BMP effectiveness and strive to attain water quality (64 FR at 68754). To protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act, the MS4 State rules (N.J.A.C. 7:14A-25) require the Department to issue permits regulating each small MS4. These MS4 permits are issued to the

Tier A or Tier B municipality and specify the minimum control measures that must be implemented. These control measures serve to reduce the discharge of pollutants from the municipality's MS4 to the maximum extent practicable pursuant to N.J.A.C. 7:14A-25.6(a)1 and 40 CFR 122.34(a) to protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act.

The Tier A MS4 NJPDES permit is issued consistent with the requirements of N.J.A.C. 7:14A-25.6 and is designed to achieve the federal Six Minimum Control Measures at 40 CFR 122.34. The Department disagrees with the commenter's assessment that 40 CFR 122.44(i) and N.J.A.C. 7:14A-13.2(a)(2) require end-of-pipe monitoring for stormwater discharges and also disagrees that these regulations require water quality based effluent limitations for stormwater discharges. Several of the NJPDES citations referenced in this comment pertain to the NJPDES program in general which includes many types of wastewater discharges, including those that are of a continuous nature unlike stormwater. As described in these regulations, stormwater discharges are best addressed through SBRs and related best management practices and control measures that Tier A Municipalities are required to implement and are designed to minimize pollutant loadings. Subchapter 25 of the NJPDES Regulations at N.J.A.C. 7:14A is specific to the Municipal Stormwater Regulation Program where N.J.A.C. 7:14A-25.6 states:

“Best management practice (BMP) requirements are generally the most appropriate form of effluent limitations when designed to satisfy technology-based requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of BMPs (other than [Optional Measures]) consistent with the provisions of the stormwater program required pursuant to this section and the provisions of the NJPDES permit required pursuant to N.J.A.C. 7:14A-25.2(a) constitutes compliance with the standard of reducing pollutants to the maximum extent practicable.”

The Tier A MS4 NJPDES permit contains significant requirements on data and information collection and reporting, which are detailed in Attachment A for existing permittees and Attachment A-1 for new permittees. The Department maintains that these requirements are the most appropriate form of monitoring. Additionally, the Department maintains that requiring end-of-pipe monitoring for municipal outfalls that discharge stormwater to surface water is impracticable and not economically feasible currently. It is worth noting that some municipalities are responsible for hundreds of MS4 stormwater outfalls and the intermittent nature of stormwater discharges presents challenges to the collection of representative samples. At this time, end-of-pipe monitoring requirements would require Tier A municipalities to divert resources that would otherwise be used to implement BMPs to reduce the discharge of pollutants. The Department maintains that the Tier A MS4 NJPDES permit includes permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable by focusing on pollution prevention.

The 2017 Tier A and Tier B MS4 NJPDES permits are intended to provide long-term benefits to stormwater quality thereby resulting in improved water quality to receiving waterbodies. These renewal permits build on the previous Tier A and Tier B permits consistent with the iterative approach described in the preamble to the Phase II rule. Compliance with these renewal permits

will lead to increased water quality in streams, rivers, lakes and ponds throughout New Jersey which should result in more waterbodies meeting their designated uses including fishing, swimming, and boating as well as protection of human health. The Department maintains that the conditions of this renewed permit, if implemented correctly, provide a continued, iterative process towards improving stormwater quality. The EPA Permit Review referenced in this comment concerns a review by EPA on the 2009 Tier A MS4 NJPDES permit where the 2009 permit did not contain the same TMDL requirements as described in this response.

Regarding the issue of impaired waterways and TMDLs, the Department acknowledges that there are impaired waterways in New Jersey as described in **Response 3-10**. Section 303(d) of the federal Clean Water Act requires development of a TMDL for the pollutant(s) responsible for each waterbody placed on the impairment list where impaired waterways are ranked and prioritized for TMDL development. As an iterative step forward, Part IV.C.2 requires Tier A Municipalities to annually identify pollutants listed in any approved or adopted TMDLs for waterbodies bordering or within the Tier A Municipality for inclusion in the SPPP and to identify strategies to address sources of stormwater related pollutants. This action serves to raise awareness of impaired waterbodies and TMDLs and to promote municipal strategies to reduce pollutant discharge from MS4s.

The Tier A and Tier B MS4 NJPDES permits have a number of enhanced conditions as compared to the 2009 Tier A and Tier B MS4 NJPDES permits. As stated in the Tier A MS4 NJPDES permit Fact Sheet, “SBRs and other control measures that Tier A Municipalities are required to implement are designed to minimize pollutant loadings in all watersheds including impaired watersheds.” Therefore, although not directly resulting from a TMDL requirement, the provisions in the Tier A and Tier B MS4 NJPDES permits are expected to further reduce the discharge of pollutants to impaired and unimpaired waterbodies and provide improved protection of currently impaired waterbodies, regardless of the existence of TMDLs.

While specific end-of-pipe monitoring is not required at this time for stormwater discharges authorized under the Tier A MS4 NJPDES permit, the Department does conduct a wide array of ambient monitoring for freshwater (rivers, streams, lakes), marine waters (bays, oceans) and tidal rivers. Monitoring is conducted for chemical/physical parameters; biological health (e.g., bottom-dwelling communities, fish populations); phytoplankton (microscopic plants) and sanitary quality (indicator of human health risk). Ambient monitoring is used to regularly assess waters of the state to determine if the New Jersey Surface Water Quality Standards (NJSWQS) at N.J.A.C. 7:9B-1 et seq are met and to assess if designated uses are supported. The Department maintains that the BMPs as included in the Tier A MS4 NJPDES permit, partnered with the Department’s existing ambient monitoring program, are the most effective way to reduce the discharge of pollutants to the maximum extent practicable. In fact, the existing ambient monitoring program will be an important resource for evaluating the effectiveness of the MS4 program. A benchmark study by the U.S. Geological Survey (USGS) that analyzed data from more than 28 monitoring stations for long-term trends in nitrogen and phosphorous showed that at 25 of the 28 study sites, concentrations of phosphorus and all forms of nitrogen decreased or did not change significantly (USGS Scientific Investigations Report 2016-5176, Trends in the Quality of Water in New Jersey Streams, Water Years 1971-2011). This study shows that the

Department's efforts to reduce pollutant discharges to surface water bodies have been successful in many watersheds.

Finally, regarding the suggestion that monitoring or water quality based effluent limitations be required based on information from other states, the Department does not agree that the ability of another state to implement certain conditions indicates that it is practicable in New Jersey. As EPA states on pages 89338 to 89339 of the preamble to the MS4 General Permit Remand Rule at 40 CFR Part 122:

“EPA does not find it necessary to expressly require the rule to compel permitting authorities to consider the terms and conditions of permits in other jurisdictions in determining the need to modify their own permits. Each permitting authority is required to issue permits that independently meet the MS4 permit standard based on an evaluation of, among other things, how well the past permit conditions worked and what more can be reasonably achieved in the next permit term. This evaluation involves factors that are necessarily unique to the permitting jurisdiction.”

No changes have been made to the final permit as a result of these comments.

17. **Comment:** Commenter 33 states that the permit requirements should be clear, specific and measurable; however, there are no requirements for water quality standards (testing and/or sampling) be they either objective or subjective. Furthermore, Commenter 33 questions what a municipal official should do if they elect to or are required to sample which is the preferred option. [33]

Response 17: Please refer to **Response 15-16** regarding sampling or monitoring requirements under the Tier A MS4 NJPDES permit.

While stream sampling by permittees or end-of-pipe monitoring are not requirements at this time under the Tier A MS4 NJPDES permit, if a municipality is interested in performing stream sampling, they have the option of providing a volunteer stormwater assessment or stream monitoring program that may involve the general public or nongovernmental organizations. Alternatively municipalities can coordinate an event through the AmeriCorps NJ Watershed Ambassador Program as an activity toward meeting the 12 points required under the Local Public Education and Outreach requirements at Part IV.B.2. If interested in these options, municipalities are advised to contact the Department's AmeriCorps NJ Watershed Ambassador Program (www.nj.gov/dep/wms/bears/ameri-corps.htm) or review the EPA National Directory of Volunteer Monitoring Programs (www.epa.gov/nps/nonpoint-source-volunteer-monitoring).

18. **Comment:** Commenter 33 states the permit should contain water quality based requirements that include an obligation for municipalities to identify and develop implementation strategies to address specific sources of stormwater related to pollutants. These requirements should be clear and worked into the permit as there are numerous intertwined ordinances related to the MS4. Commenter 33 states that all stormwater management should be coordinated, in particular;

N.J.A.C. 5:21, N.J.A.C. 7:8, 7:14A-24 and N.J.A.C. 7:14A-25. Additionally, buffer and maintenance requirements should also be included as a MS4 requirement. [33]

Response 18: The Tier A MS4 NJPDES permit explicitly requires Tier A Municipalities to address various sources of stormwater related pollutants in a holistic manner. Examples include requirements to reduce pollutant discharges from roads and parking lots, such as street sweeping, storm drain inlet retrofitting, and catch basin cleaning; reduce pollutant discharges from municipal maintenance yard operations, such as fueling operations, vehicle maintenance, and salt and de-icing material storage and handling; and reduce pollutant discharges from construction site stormwater runoff and post construction stormwater runoff. The various ordinances required by the permit are also intended to make clear to the municipality that it is required to address various pollutant sources, such as pet waste, illicit connections, and yard waste. Please refer to **Response 15-16** above regarding the imposition of water quality based requirements.

New Jersey's MS4 NJPDES general permit program was developed under the NJPDES Regulations at N.J.A.C. 7:14A-25, which requires all New Jersey municipalities to apply for a NJPDES permit, as well as N.J.A.C. 7:8 which establishes the requirements for stormwater management plans and stormwater control ordinances, design and performance standards for stormwater management measures, and long-term operation and maintenance of stormwater management measures.

The Department maintains that the various state regulations and plans as referenced in this comment that affect stormwater management have been coordinated in the Tier A MS4 NJPDES permit. N.J.A.C. 5:21 contains the Residential Site Improvement Standards, which establish standards for residential projects, including requiring compliance with the standards in N.J.A.C. 7:8. Because the standards in N.J.A.C. 7:8 and N.J.A.C. 5:21 specifically apply to post construction stormwater management, compliance with these standards is required under Part IV.B.4 Post Construction Stormwater Management in New Development and Redevelopment of the Tier A MS4 NJPDES permit.

The Tier A MS4 NJPDES permit has been written to clarify the maintenance requirements for stormwater facilities. The maintenance requirements can be found in Part IV.C.1 Minimum Standards for Stormwater Facilities Maintenance.

No changes have been made to the final permit as a result of this comment.

19. **Comment:** Commenter 15 urges the Department to incorporate water quality based requirements into the Tier B MS4 NJPDES permit along with the Tier A MS4 NJPDES permit. New Jersey regulations at N.J.A.C. 7:14A-13.2(a)(2) provide that all permits regulating discharges into surface water (including Tier B MS4 permits) "shall include ... [w]ater quality based limitations ... when the Department has determined that the discharge causes, has the reasonable potential to cause, or contributes to an excursion above the SWQS [water quality standards]." Water quality is impaired throughout the state, including in Tier B communities, and stronger water quality based requirements are needed in order to address this ongoing source of pollution. [15]

Response 19: This comment refers to the Tier B MS4 NJPDES permit where the commenter has correctly stated that the Tier B MS4 NJPDES permit does not require the permittee to conduct end-of-pipe monitoring at this time. Tier B Municipalities are generally located in more rural areas and in non-coastal regions and the Department maintains that monitoring requirements are not appropriate for the same reasons discussed in **Response 15-16** for Tier A Municipalities. The Tier B MS4 NJPDES permit contains a subset of the Tier A MS4 NJPDES permit provisions including requirements that pertain to local public education and outreach, post-construction stormwater management for new development and redevelopment, and requirements to ensure public and private stormwater facility operation and maintenance.

No changes have been made to the final permit as a result of this comment.

20. **Comment:** Commenters 5, 20 and 23 state that the changes to the 2017 Tier A MS4 NJPDES permit will increase their costs to manage this regulatory program and further burden the towns' resources with unnecessary mandates. These commenters state that it is a struggle every year to put forth a budget that is fair to the tax payers but addresses the various mandates that have been imposed including those related to the Municipal Stormwater Regulation Program. With respect to compliance with the municipal stormwater regulation requirements in N.J.A.C. 7:14A et seq., these commenters state that their towns have served as a model for Tier A Municipalities in the Highlands Region. Commenters 5, 20 and 23 request that the permit be rewritten to only include changes required by explicit EPA mandates and that the 2017 permit largely resemble the 2009 permit. [5] [20] [23]
21. **Comment:** Commenters 13 and 29 express concern that the proposed permit conditions concerning stormwater facilities maintenance, public education and outreach, and municipal board and governing body member training greatly increases the burden on township staff, budgets and volunteer residents. Commenters 13 and 29 express concern regarding the impacts of the permit on staff levels and budgets at the local levels which in turn places increased burden on the residents. Commenters 13 and 29 ask that State grant opportunities for local governments to implement the new program requirements be pursued. [13] [29]
22. **Comment:** Commenter 3 states that generally the draft MS4 permit includes the following new or modified requirements: more frequent site inspections of storm water outlets; significant additional administrative costs, including increases in record keeping for Public Works, Engineering and the municipality; enhanced mapping requirements regarding storm water outlets; and enhanced public awareness campaigns and educational requirements without a funding source. Commenter 3 raises specific concern about the following requirements as applied to Tier A Municipalities: (i) implement public education and outreach programs and educational pollution prevention activities about the impacts of stormwater discharges on surface water and groundwater that involve the public in reducing pollutants in stormwater and mitigating flow, and (ii) annually conduct activities that total at least 12 points and include activities from at least 3 of the 5 categories set forth in Attachment B. [3]
23. **Comment:** Commenter 16 states that based on their review of the crosswalk document, there are numerous examples of enhanced requirements and new requirements that did not previously exist

on this ever expanding permit program. However, no funding for the program has been provided by the Department for the past 10 years. When this permit program was implemented in 2004, the Department pledged to keep the program as simple and manageable as possible. Commenter 16 states that it is unfortunate the Department does not acknowledge that this permit has become a heavy burden on all municipalities, especially to those who have historically required developers to properly manage stormwater, as municipalities are now being penalized with excessive record keeping and maintenance responsibilities. [16]

Response 20-23: The Department acknowledges that there are changes to the Tier A and Tier B MS4 NJPDES permits that may require additional resources. As part of the release of the draft renewal permits, the Department prepared crosswalk documents to highlight any significant changes from the 2009 existing permits as compared to the newly proposed Tier A and Tier B MS4 NJPDES permits. These crosswalk documents are available at: www.state.nj.us/dep/dwq/tier_a.htm for the Tier A MS4 NJPDES permit and at www.state.nj.us/dep/dwq/tier_b.htm for the Tier B MS4 NJPDES permit.

The recordkeeping requirements of the permit are those that will enable the municipality to document the status of compliance in the Annual Report and Certification. The 2009 permit already required municipalities to be able to certify to compliance with various requirements.

As discussed in both the Tier A and B MS4 NJPDES permit Fact Sheets, the Department conducted extensive compliance and stakeholder outreach during the permit renewal process. A series of small group workshops with municipal permittees were held in an effort to explain and gather feedback about proposed permit conditions. Notification of such workshops was provided via e-mail invitation to all Stormwater Coordinators and mayors in New Jersey's permitted municipalities. A total of 230 municipalities participated in this process. The Department released preliminary draft versions of the Tier A and Tier B MS4 NJPDES permits on February 16, 2017, in advance of the release of the draft permits, to assure a transparent and informative stakeholder process.

The Department acknowledges that many permittees expressed concern about certain requirements as proposed in the preliminary draft and draft permits and described challenges to managing their existing Tier A and Tier B MS4 NJPDES permit obligations. These permittees claim that New Jersey municipalities are faced with restrictions on municipal budgets, have limited staffing, and have other regulatory burdens. Conversely, other stakeholders suggested changes to the permit to improve stormwater quality as discharged from MS4s. Many acknowledged the importance of proper operation and maintenance and the benefits of a stormwater facility inventory but expressed concern about costs and the need to balance competing priorities and obligations of municipal operations. These comments and concerns were considered in the preparation of the Tier A and Tier B MS4 NJPDES permits with clarifications. While the majority of permit requirements were carried over from the 2009 Tier A and Tier B MS4 NJPDES permits, the Department acknowledges that a limited number were expanded.

To respond to these concerns, the Department developed various tools to reduce costs for municipalities in meeting permit requirements, particularly for the few expanded requirements. For example, the Department has created a Total Maximum Daily Load (TMDL) Look-Up Tool (see Part IV.C.2 of the Tier A MS4 NJPDES permit) to simplify the process of identifying TMDLs applicable to each municipality. The Department is also creating a free to use stormwater facilities mapping web application that municipalities may use at their convenience. The Department anticipates the application will be expanded in future versions to allow the user to document additional information, including records of maintenance actions. In addition, both the Stormwater Management Design Review Training and Municipal Board and Governing Body Member Related Training can be fulfilled through free training. Specifically, Stormwater Management Design Review training will be offered by the Department at least twice per year at no cost. Municipal Board and Government Body Member Related Training is fulfilled through clear and concise online free training so a member need not to travel to take the training and can access the trainings at any time. The Local Public Education and Outreach points system has been expanded to include new activities and events which, rather than burdening municipalities, provides them with more options, and the Department is developing new educational resources free for municipalities to use. As explained in the Fact Sheet regarding Education and Outreach, “many of these options are low or no cost and allow municipalities to take credit for community service activities that may be occurring in their municipalities.” As a result of these and other improvements, the Department believes the permit requirements will not incur excessive costs to the municipalities, while also providing an iterative step forward to reducing the discharge of stormwater related pollutants to the maximum extent practicable consistent with the Clean Water Act.

No changes have been made to the final permits as a result of these comments.

24. **Comment:** Commenter 10 provided comments on the Tier B MS4 NJPDES permit and states that that the expansion of municipal post-construction maintenance responsibility to all privately-owned stormwater management system built since 1984 represents a significant, unfunded burden upon municipalities. The ability for municipalities to pay for these activities is limited by state-imposed constraints on property tax increases and ever-increasing demands on a multitude of municipal budget items, such as affordable housing, employee benefits, and building maintenance. This requirement must be removed from any Tier B MS4 NJPDES permit renewal. [10]

Response 24: While Commenter 10 has specified that his comments pertain to the Tier B MS4 permit (NJ0141861) only, the Department notes that the Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment, is identical in the Tier A and Tier B MS4 NJPDES permits. Please refer to **Response 190-194** for a detailed response regarding ensuring maintenance of privately-owned stormwater management systems.

No changes have been made to the final permit as a result of this comment.

25. **Comment:** Commenter 10 states that the Tier B MS4 NJPDES permit should more clearly address the Department’s expectations for municipal maintenance and monitoring of

privately-owned storm sewer systems that discharge directly into either County or State owned storm sewer systems. Commenter 10 states that the Tier B MS4 NJPDES permit should also more clearly address the Department's expectations for municipal maintenance and monitoring of privately-owned storm sewer systems that discharge directly into either state open waters or underground aquifers (infiltration basins).

Commenter 10 states that since such privately-owned storm sewer systems do not discharge into an MS4, it can be concluded that the municipality does not bear any responsibility for ensuring maintenance and monitoring of such privately owned systems. [10]

Response 25: Commenter 10 has specified that his comments pertain to the Tier B MS4 NJPDES permit (NJ0141861). Regarding monitoring of privately-owned storm sewer systems, the Department notes that neither the Tier A nor Tier B MS4 NJPDES permits require effluent monitoring for discharges from the MS4 at this time, regardless of the discharge location. Please refer to **Response 15-16** above.

Regarding the Department's expectations for municipal maintenance of privately-owned storm sewer systems and stormwater facilities that do not discharge into an MS4, the Department maintains the municipality is required to have a program in place to ensure maintenance of privately owned stormwater facilities. As to these facilities that do not discharge into an MS4, municipalities are responsible for reviewing and approving the development that is privately-owned to make sure that the "design and performance standards for stormwater management measures" are satisfied and that stormwater control ordinances continue to be followed. N.J.A.C. 7:8-5.1. As part of a municipality's stormwater management plan, a municipality is supposed to "[d]escribe how adequate long-term operation as well as preventative and corrective maintenance . . . of the selected stormwater management measures will be ensured." N.J.A.C. 7:8-4.2. Stormwater facilities within a municipality should conform to a municipality's stormwater management plan and stormwater control ordinances. Such stormwater facilities are under the municipality's purview through municipal stormwater control measures even if they do not not discharge into the MS4 directly. This stormwater permit is the mechanism by which the Department insures the relevant stormwater pollution controls of N.J.A.C. 7:8 are properly implemented. To ensure proper maintenance, the municipality has discretion on the type of program it may wish to develop and implement to ensure privately owned stormwater facilities are maintained. Examples could include requiring an annual certification by private entities, or submission of completed maintenance logs and inspection records, as noted within Attachment E of the Tier B permit.

Additionally, stormwater management basins (i.e., infiltration basins) are within the authority of the Tier B MS4 NJPDES permit since this permit serves to incorporate the requirements of N.J.A.C. 7:8 with respect to municipal review and approval of stormwater management basins. As stated at Part IV.B.2.a of the Tier B MS4 NJPDES permit:

"a. The Tier B Municipality shall develop, update, implement and enforce its stormwater management program to address post construction stormwater runoff in new development

and redevelopment and to ensure compliance with the Stormwater Management rules at N.J.A.C. 7:8 et seq. In general, the regulations at N.J.A.C. 7:8:

- i. Contain requirements for stormwater management plans and stormwater control ordinances;
- ii. Provide information for the adoption and implementation of municipal stormwater management plans and regional stormwater management plans; and
- iii. Establish design, performance and maintenance standards for stormwater management measures and establish safety standards for stormwater management basins.”

Please refer to **Response 58** and **Response 196** for additional information on the regulatory jurisdiction of the Tier B MS4 NJPDES permit. Please refer to **Response 195** for additional information on the Department’s legal authority.

The Department maintains that the Tier B MS4 NJPDES permit as written serves to clarify these issues and no changes are needed.

26. **Comment:** Commenter 4 states that the Department must consider cost impacts in its readoption process. The State has mandated a 2% budget cap on municipalities. Commenter 4 requests that a cost analysis of each proposed change be provided. This analysis should show that increased costs are offset by savings, and/or the overall costs of implementation will remain within the 2% cap over the course of the permit period. [4]

Response 26: The Department publishes an Economic Impact Statement in the New Jersey Register during the proposal stage of a rule adoption. However, the Department maintains that readoption of a rule and renewal of NJPDES permits are separate and distinct issues. Specifically, the draft Tier A and B MS4 NJPDES permit renewal process is conducted under the NJPDES rules (N.J.A.C. 7:14A-1 et. seq.) which do not require an economic impact statement or cost analysis for the permit renewal process. In addition, due to the number of municipalities within the State and the variability of factors such as population and area, it would not be feasible to develop a cost analysis of all changes and the effects on each individual municipality.

No changes have been made to the final permit as a result of this comment.

27. **Comment:** Commenter 17 expresses concern that the proposed permit conditions concerning stormwater facilities maintenance, public education and outreach, and municipal board and governing body member training will overly burden municipal budgets and severely impact resources that are currently used to serve the public. Commenter 17 states that all enhanced permit requirements require review as a matter for “State mandate state pay.” [17]
28. **Comment:** Commenter 3 expresses concern that a number of the specific requirements contained within the Department’s draft Tier A and Tier B MS4 NJPDES permits, either by themselves or

collectively, may constitute unfunded mandates upon municipalities which is prohibited under Article VIII, Section 2, Paragraph 5 of the New Jersey State Constitution. The Council on Local Mandates established by the State Constitution developed the following three pronged test to identify unconstitutional unfunded mandates:

- (i) That a rule or regulation imposes a mandate on a unit of local government;
- (ii) That additional direct expenditures are required for the implementation of the rule or regulation; and
- (iii) That the rule or regulation fails to authorize resources, other than the property tax, to offset the additional direct expenditures. IMO Complaints filed by the Monmouth-Ocean Education Services Commission, et al. at 6 (August 20, 2004).

Commenter 3 states that In IMO Complaint filed by Roxbury Township (August 14, 2011), Roxbury Township objected to the requirement in the Department's MS4 Tier A General Permit requiring the municipality to adopt and enforce ordinances requiring (i) dumpsters and other refuse containers that are outdoors or exposed to stormwater to be covered at all times and (ii) the retrofitting of existing storm drain inlets which were in contact with repairs or resurfacing on private property. The Council on Local Mandates determined the Department's Tier A MS4 NJPDES permit issued to Roxbury Township, which required it to adopt and enforce ordinances relating to dumpsters and refuse containers, was an unfunded mandate which violated the New Jersey State Constitution. [3]

Response 27-28: Federal regulations govern the MS4 permit program and the issuance of the Tier A MS4 NJPDES permit is in accordance with federal regulations. Regardless of whether the Department or the federal agency implements the MS4 program, municipalities that operate an MS4 are required to follow the requirements of the federal regulations which this permit implements. The Department is renewing the Tier A MS4 NJPDES permit and is not promulgating a rule or regulation as described in the three-pronged test (items (i) through (iii)) in the comment above. Additionally, while the Department acknowledges the position of the Council on Local Mandates regarding Roxbury Township relating to the adoption and enforcement of ordinances for dumpsters and refuse containers as required by the 2009 Tier A MS4 NJPDES permit, the Roxbury decision is specific to the particular facts at issue in that matter. In this permit cycle, the Department is not requiring any new local ordinances as part of renewal of the Tier A and Tier B MS4 NJPDES permits. In fact, the fertilizer management ordinance and the refuse container/dumpster ordinance are not included in the Tier A MS4 NJPDES permit as required ordinances as they were in the 2009 Tier A MS4 NJPDES permit. The former was removed since the NJ Fertilizer Act, P.L.2010, c112 (C.58:10A-61) took effect on January 5, 2012 and preempts local regulation on the matter whereas the latter was removed due to a ruling by the Council on Local Mandates as described in this comment. While the former ordinance is preempted by state law, the latter may continue to be enforced by municipalities as an optional measure since requiring lids on dumpsters is an effective and reasonable means of reducing the negative health, safety and environmental impacts associated with poorly maintained or uncovered dumpsters.

The commenters have not identified specific provisions which they consider to be unfunded or set forth any projected additional expenditures in their comments. As to the general permit conditions identified by commenter 17, the stormwater facilities requirements are a continuation and clarification of the requirements of the 2009 permit (a subset of which are governed by stormwater management regulations which predate the cut-off date for jurisdiction of the Council on Local Mandates under N.J.S.A. 52:13H-2) as described in **Response 190-194**. The public education requirements are flexible and low-cost, see **Response 88-93**, while the municipal board and governing member body training requirements are satisfied by taking the Department's free and concise online training, see **Response 154-158**. As stated elsewhere in the response to comments, for the most part, the Department has continued the requirements of the 2009 permit with clarifications so municipalities that have been properly implementing the 2009 MS4 permit should not see an increase in expenditures as a result. For the limited number of additional requirements, the Department has made efforts to provide tools to keep costs low or structure the requirements in a way which will allow the municipality to keep costs down. Some of these requirements cross-reference rules that apply to non-governmental entities engaging in the regulated activities and not just municipalities.

No changes have been made to the final permits as a result of these comments.

29. **Comment:** Commenter 22 states that the written opinion as issued on December 21, 2011 by the Council on Local Mandates (Council) in response to a complaint filed by Roxbury Township needs to be represented in the draft Tier A and Tier B MS4 NJPDES permit Fact Sheet. While the Fact Sheet at Sections 7.A and 7.D explains that the Refuse Container/Dumpster Ordinance from the 2009 Tier A MS4 NJPDES permit was moved from being an SBR to an Optional Measure based on the Council's opinion, the Fact Sheet fails to summarize the reasons and implications of the Council's decision. Commenter 22 asserts that the Council's written opinion undermines the legal foundation of the NJPDES Stormwater Regulation Program as applied to Tier A and Tier B Municipalities. The opinions syllabus states:

"The Township of Roxbury filed a complaint with the Council on Local Mandates seeking a declaration that N.J.A.C. 7:14A-15.15, a regulation promulgated by the New Jersey Department of Environmental Protection, constitutes an unfunded mandate insofar as it requires the municipality to act as the enforcement agent to ensure compliance with DEP [Department of Environmental Protection] requirements that (1) outside dumpsters and other refuse containers exposed to stormwater are covered at all times and (2) existing private catch basins are retrofitted in conjunction with any repair or reconstruction of private property. On the parties' cross-motions for judgment, the Council held that the municipal dumpster-covering obligation is an unfunded mandate and thus void, but that the retrofitting obligation is not an unfunded mandate."

In addition, Commenter 22 states that the Fact Sheet does not summarize the Department's position as to why the Department believes the draft permit does not impose any unlawful "unfunded mandates." In 2004, the Department publicly and officially explained the NJPDES rules for the Municipal Stormwater Regulation Program would not trigger "State mandate-State pay" requirements. However, because this 2004 position now clearly conflicts with the

Council's 2011 written opinion, Commenter 22 states that the Department must now reconsider its 2004 position and discuss that reconsideration in any final permit decision. Commenter 22 states that these legal considerations must be analyzed by the New Jersey Attorney General's Office and discussed in any final permit decision. [22]

Response 29: The Department is aware of and understands the history of the decision made by the Council on Local Mandates with respect to the complaint filed by Roxbury Township. As described in this comment, this determination focused on the municipal dumpster-covering obligation. As noted by Commenter 22, the Department addresses the decision made by the Council on page 60 of the Fact Sheet under Optional Measures, where it states:

“...this requirement [the Refuse Container / Dumpster Ordinance] was not carried forward as an SBR in this draft Tier A MS4 NJPDES permit based on a December 21, 2011 decision by the Council on Local Mandates in response to a complaint filed by Roxbury Township.”

Additionally, there is a tabular comparison of the 2009 Tier A MS4 NJPDES permit SBRs against the Tier A MS4 NJPDES permit SBRs to highlight any changes as part of the draft renewal process. Footnote 1 concerns the refuse container/dumpster ordinance and states “Not carried forward in proposed renewal based on December 21, 2011 decision by the Council on Local Mandates in response to a complaint filed by Roxbury Township.”

Consistent with N.J.A.C. 7:14A-15.8(b), the Fact Sheet was drafted to “briefly set forth the principal facts and the significant factual, legal, methodological, and policy considerations examined during preparation of the draft permit.” The Department is not required to analyze the decision by the Council or to discuss the decision beyond its direct effect on permit requirements. The Department maintains that the impacts of the Council regarding this decision were considered and that the resulting description within the Fact Sheet is appropriate.

Regarding the assertion that the Tier A MS4 NJPDES permit contains unfunded mandates, the Department disagrees with this assessment. Please refer to **Response 27-28.**

No changes have been made to the final permit as a result of this comment.

30. **Comment:** Commenter 22 states that the written opinion issued on December 21, 2011 by the Council undermines the legal foundation of the NJPDES MS4 Program. Commenter 22 states that the Council's written opinion is not limited to invalidation of Part I.F.5.f Refuse Container/Dumpster Ordinance of the 2009 Tier A MS4 NJPDES permit but sets forth important doctrine about “unfunded mandates” in other portions of the 2009 Tier A MS4 NJPDES permit. Commenter 22 provides historical background on unfunded mandates including excerpts from the NJPDES rule adoption notice published in the February 2, 2004 New Jersey Register, the Department's November 23, 2010 brief submitted to the Council, and the Council's written opinion rejecting the Department's position.

Commenter 22 presents two distinct ways that invalidation of Part I.F.5.f Refuse Container/Dumpster Ordinance of the 2009 Tier A MS4 NJPDES permit appears to narrow

significantly the federal law exemption in the New Jersey “unfunded mandates” law. First, the Council indicated that State agency rules necessary to maintain delegation of a federal program can never be deemed to be “required to comply with federal laws or rules” if New Jersey’s delegation of the federal program can be withdrawn. Secondly, the Council indicated that whenever the Department or another State agency translates “broad federal standards” into specific measures, those measures can never be deemed to be “required to comply with federal laws or rules” even though federal standards are often expressed in broad terms that require such State translation. Note also that the New Jersey “unfunded mandates” law, N.J.S.A. 52:13H-18, states that "pursuant to Article VIII, Section II, paragraph 5(b) of the New Jersey Constitution, rulings of the council shall be political determinations and shall not be subject to judicial review."

Commenter 22 adds that there is no reason to believe the Council’s narrow and possibly mistaken interpretation of the unfunded mandate law’s federal law exemption applies only to Part I.F.5.f Refuse Container/Dumpster Ordinance of the 2009 Tier A MS4 NJPDES permit. Commenter 22 states that both the existing 2009 Tier A MS4 NJPDES permit and the draft Tier A MS4 NJPDES permit include requirements that are more vulnerable to an "unfunded mandates” challenge than was the Refuse Container/Dumpster Ordinance requirement that the Council found in 2011 to be an “unfunded mandate.” These requirements of the draft Tier A MS4 NJPDES permit currently appear to have no adequate funding source (except in some respects for “combined sewer areas”) for municipal implementation other than the property tax. Examples are as follows:

- Part IV.B.1.b - Posting documents on the Tier A Municipality’s website,
- Part IV.B.2 - Local public education and outreach,
- Part IV.B.5.a - Community wide controls for wildlife feeding, litter, improper disposal of waste, and yard waste,
- Part IV.B.5.b - Street sweeping; catch basin and storm drain inlet inspection and cleaning; retrofit of existing municipally owned or operated storm drain inlets,
- Part IV.B.5.c - Municipal maintenance yards and other ancillary operations,
- Part IV.B.6 - Outfall pipe mapping; stream scouring; illicit discharge detection, elimination, and prohibition,
- Part IV.C - Maintenance of municipally owned or operated stormwater facilities; Total Maximum Daily Load (TMDL) information

Commenter 22 provides similar comments for the Tier B MS4 NJPDES permit. Similarly, Commenter 22 states that both the existing 2009 Tier B MS4 NJPDES permit and the draft Tier B MS4 NJPDES permit include requirements that are more vulnerable to an "unfunded mandates” challenge than was the Refuse Container/Dumpster Ordinance requirement that the Council found in 2011 to be an “unfunded mandate.” These requirements of the Tier B MS4 NJPDES permit currently appear to have no adequate funding source for municipal implementation other than the property tax. Examples are as follows:

- Part IV.B.1 Local public education and outreach,

- Part IV.B.2 Post construction stormwater management in new development and redevelopment

Regarding both the Tier A and Tier B MS4 NJPDES permits, Commenter 22 continues by stating that the executive and/or legislative branches of New Jersey state government could take various actions to address issues raised by the Council in its written opinion by changing these circumstances. Such actions could include:

- Providing funds to municipalities from a source(s) other than the property tax. Such funds could be from State appropriations, or the Legislature could specifically authorize by statute the municipal establishment of fee-based systems for stormwater utility management.
- Revising rules to require certain non-government entities (such as large homeowners associations and commercial property owners) to perform such activities as local education and outreach; control of wildlife feeding, litter, improper disposal of waste, and yard waste; street sweeping; catch basin and storm drain inlet inspection and cleaning; maintenance yard BMPs; stream scouring remediation; illicit discharge control; and stormwater facilities maintenance. For such activities, such requirements might enable the MS4 NJPDES permit to qualify for the “unfunded mandate” exemption for requirements “imposed on both government and non-government entities in the same or substantially similar circumstances” (N.J. Const. Art. VIII, §2, 5(c)(2); N.J.S.A. 52:13H-3b).
- To clarify the scope of the federal law exemption, the Legislature could place a constitutional amendment on the ballot, or amend the Local Mandates Act to provide a legislative interpretation that the Council might consider when the Council next considers this exemption. [22]

Response 30: The Department does not agree that the Council’s decision in the Roxbury case undermines the legal foundation of the NJPDES MS4 program. The Department also disagrees with the commenter’s assessment that the Council’s finding extends beyond the dumpster covering obligation and into other parts of either the 2009 Tier A and Tier B MS4 NJPDES permits or this 2017 Tier A and Tier B MS4 NJPDES permits.

Additionally, as described in **Response 27-28**, the Department maintains that the permit requirements referenced in this comment do not constitute unfunded mandates. The Department does not agree that the suggested action are within the scope of the NJPDES renewal permit process.

No changes have been made to the final permits as a result of this comment.

31. **Comment:** Commenter 4 states that the Department collects a significant sum in Tier A MS4 NJPDES permit fees statewide. Municipalities get very little if anything in return for these mandated fees. Commenter 4 suggests that the fees collected be put to use to diminish the local cost of compliance and provide for such common services under the educational requirements such as statewide radio, TV and print ads. Commenter 4 states that these fees could be used for

Geographical Information Systems (GIS) equipment and software for loan use to meet the mapping goals, as two examples. [4]

Response 31: The Department is responsible for administering the NJPDES program that regulates the discharge of pollutants to the surface and ground waters of the State. Pursuant to N.J.S.A. 58:10A-9 of the State Water Pollution Control Act, the Department is authorized to "establish and charge reasonable annual administrative fees, which fees shall be based upon, and shall not exceed, the estimated cost of processing, monitoring and administering the NJPDES permits." The fees associated with the Tier A and Tier B MS4 NJPDES permits cover the Department's costs of issuing and managing the permits, review of NJPDES permit applications, the development of specific permit terms and conditions, and the review of annual reports. Additionally, permit fees cover costs for the Department to evaluate compliance with the terms and conditions of each NJPDES permit, conduct periodic compliance inspections, and provide compliance assistance.

The Department maintains that it has historically provided and continues to provide a wide variety of free tools and services to assist municipalities with many of the broad topics covered by the Tier A MS4 NJPDES permit. A summary of these services is as follows:

- Video and audio Public Service Announcements readymade for local TV, cable access and radio use as well as general guidance and educational resources are available on the Department's cleanwater.nj.org website.
- Additional resources and guidance materials such as sample SPPPs, MSWMPs, models of municipal stormwater control ordinances, supplemental education information, and the Tier A MS4 NJPDES permit guidance document are available at www.nj.gov/dep/dwq/tier_a_guidance_other.htm.
- A 2-day Stormwater Management Review Course intended for individuals who review major development projects for compliance with the requirements of the Stormwater Management rules. Participants who successfully complete the course can receive continuing education credit toward their licensed profession. There is no fee for this course.
- The Department's "Asking the Right Questions in Stormwater Review Training Tool" is available (www.njstormwater.org) for Municipal Board and Governing Body members. This interactive training tool provides a general understanding of the post-construction section of the permit, which requires review of major development projects for proper post-construction stormwater management.
- The Department's "Stormwater Management Rule Video Series" (www.njstormwater.org) for those involved in stormwater management planning, design, and review, and a "Stormwater Management Maintenance" training giving an overview of stormwater BMP functions and maintenance requirements.

Finally, the Department is developing a “MS4 Inventory & Mapping” mobile device application (app) for field use on personal handheld devices such as a smartphone, Android, iPhone, BlackBerry or iPad. In January 2018, this app along with any necessary licensing will be made available to municipalities, at no cost, to assist permittees with maintaining an up-to-date electronic stormwater infrastructure inventory. The stormwater infrastructure inventory will help permittees comply with their requirements to perform inspections and maintenance of stormwater infrastructure, conduct an illicit discharge detection and elimination program, conduct a scouring detection and elimination program, and comply with the outfall pipe mapping requirements set forth in the permit.

Please note that while the Department continues to update education materials this should not deter municipalities from using content that is currently available. As an alternative to developing their own materials, municipalities may use stormwater educational information provided by the Department, EPA, or environmental, public interest, or trade organizations.

In summary, the Department maintains that it offers a wide variety of compliance tools and training to assist permittees with many of the broad topics covered by these permits and that permit fees are used appropriately.

No changes have been made to the final permits as a result of these comments.

32. **Comment:** Commenter 18 states that the NPDES Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed Reg. 89320 December 9, 2016 @ 89334-89337 contains a discussion about 40 CFR 122.34(a) requirements and states that general MS4 permit conditions be expressed in “clear, specific and measurable terms.” In that regard, Commenter 18 notes numerous instances of the following caveat language: “as necessary”, “should,” and “as appropriate” (See, 81 FR 89334 at 89335). Commenter 18 suggests that the Department revisit the draft permit and make revisions to ensure that there is no “uncertainty as to what specific actions the permittee is expected to take, and is therefore difficult to comply with [and] assess compliance.” [18]
33. **Comment:** Commenter 14 notes the frequent use of various caveat expressions, such as “as necessary” or “as appropriate” throughout the permit. Commenter 14 states that use of these phrases and other words adds considerable uncertainty as to what actions will be taken. Commenter 14 encourages the Department to eliminate the use of these phrases throughout the document or to provide additional clarification when the use of these phrases is necessary. [14]

Response 32-33: The draft Tier A and Tier B MS4 NJPDES permits use the terms “as necessary,” “as appropriate” and “should” in limited instances. The Department evaluated each use of these terms and maintains that these terms are used in a relevant manner. The following discusses each use of these terms. Each presentation of the phrase in question is underlined in the quoted text.

Part IV.B.4.f.iii and Part IV.B.2.f.iii, of the draft Tier A and Tier B MS4 NJPDES permits, respectively, state that the Municipality:

“shall review and update its MSWMP [Municipal Stormwater Management Plan] as necessary, and as a part of the reexamination of its municipal master plan in accordance with N.J.A.C. 7:8-4.3(c) and (d).”

Use of this term is consistent with N.J.A.C. 7:8-4.3(c) and (d) which state, respectively, that “The municipality shall amend the municipal stormwater management plan . . . as necessary” and “The municipality shall reexamine the municipal stormwater management plan at each reexamination of the municipality’s master plan in accordance with N.J.S.A. 40:55D-89.”

N.J.S.A. 40:55D-89 (the Municipal Land Use Law) requires Planning Boards to reexamine the municipal master plan at least every six years. Therefore, a municipality must review and update its MSWMP at least once every six years. The permit language is intentionally intended to remain consistent with that rule and the Municipal Land Use Law if either are amended in the future. Moreover, the term “as necessary” when used above is not uncertain because there are specific provisions in the permits that would render certain changes necessary because they would require revision of the MSWMP outside of the reexamination schedule for the municipal master plan. An example of when a municipality might review and update its MSWMP “as necessary” would be to revise a mitigation plan to reflect a change in local environmental conditions or planning objectives (see Part IV.B.4.h of the Tier A MS4 NJPDES permit and Part IV.B.2.h of the Tier B MS4 NJPDES permit). The Department made no change to Part IV.B.4.f.iii and Part IV.B.2.f.iii, of the final Tier A and Tier B MS4 NJPDES permits, respectively, in response to these comments.

Part IV.B.5.b.ii of the draft Tier A MS4 NJPDES permit states:

“The Tier A Municipality shall inspect storm drain inlets and any associated catch basins that it owns or operates and remove sediment, trash, or debris when present. Each catch basin and inlet shall be inspected at least once every five years. The Tier A Municipality shall clean any municipally owned or operated storm drain inlet or catch basin as frequently as necessary to eliminate recurring problems and restore proper function.”

As discussed in on Pages 24-25 of the Tier A MS4 NJPDES permit Fact Sheet, the core requirement is that each municipally owned and operated storm drain inlet and any associated catch basin be inspected at least once every five years and cleaned when sediment, trash or debris is present. The catch basin cleaning requirement is in addition to the core requirement and is changed from the expired 2009 Tier A MS4 NJPDES permit where the use of the phrase “as frequently as necessary” is intentional to allow flexibility but at the same time accompanied limiting/clarifying language that follows the phrase in this permit. The requirement in question was added to ensure that any given catch basin or storm drain inlet is cleaned as frequently as necessary to ensure proper function and operation. This allows municipalities flexibility in implementing the requirement based on local knowledge of their MS4 and acknowledges a municipality’s limited resources yet ensures that proper stormwater runoff protections are in place. This approach is pragmatic and preferable to the set schedule found in the 2009 Tier A MS4 NJPDES permit. Because function must be assured, municipalities must focus resources

on common problem areas rather than a one size fits all requirement. Associated language at Part IV.C.1.a.iv requires municipalities to prioritize catch basin and inlet cleaning based not only on catch basin and inlet inspection records but also on other factors intended to promote municipal attention in areas of the MS4 that will yield the greatest environmental, health and safety benefit. The Department maintains that these changes constitute reasonable progress towards reducing pollutant discharges associated with poorly maintained catch basins and storm drain inlets to the maximum extent practicable. The Department made no change to Part IV.B.5.b.ii of the final Tier A MS4 NJPDES permit in response to these comments.

Part IV.F.1.c of the draft Tier A MS4 NJPDES permit states:

“The Tier A Municipality shall review the SPPP [Stormwater Pollution Prevention Plan] at least annually and update it as often as necessary to reflect changes related to the municipality’s Tier A MS4 Stormwater Program.”

See **Response 228** explaining the use of the phrase “as often as necessary” in this permit condition. Again, the phrase is clarified and limited by the accompanying phrase “to reflect changes related to the municipality’s Tier A MS4 Stormwater Program.” In context, the language is clear because, as stated in **Response 228**, it accounts for other specific permit provisions under which certain SPPP information may change (aside from SPPP information required to be updated annually). The Department made no change to Part IV.F.1.c of the final Tier A MS4 NJPDES permit in response to these comments.

Page 3 of Attachment B of the draft Tier A and Tier B MS4 NJPDES permits describe the “Water Education Workshops” activity as follows:

“Organize an educational contest with a local school district or a local community organization . . . The winning design should be shown on the municipality’s website or social media site, if practical.”

The use of the word “should” in this context is appropriate and does not diminish the value of, or the effort required by the municipality to offer, the described educational activity. Nor does the use of the term create confusion or uncertainty as to the requirement, especially since “should” is accompanied by “if practical.” The Department made no change to Attachment B of the final Tier A and Tier B MS4 NJPDES permits in response to these comments.

Pages 3, 4 and 8 of Attachment E of the draft Tier A MS4 NJPDES permit contains seven instances of the word, “should” relative to vehicle wash wastewater containment. Examples include:

“Any underground tanks and associated piping should be tested for integrity every 3 years.”

“Overfill prevention should include manual sticking/gauging of the tank before each use”

“Tank should no longer accept wash wastewater when determined to be at 95% capacity.”

The Department agrees that the use of “should” in this context does not properly reflect the mandatory nature of these requirements as reflected in the Fact Sheet and the other language in Attachment E. The Department has changed each instance of the word “*should*” to “*shall*” in Attachment E of the final Tier A MS4 NJPDES permit.

Regarding the SPPP, the third paragraph of the General portion of Attachment A and A-1 of the draft Tier A MS4 NJPDES permit states that:

“In addition to the requirements of Part IV.F.1 above, the SPPP shall identify and discuss the Minimum Standard of each Statewide Basic Requirement (Part IV.B, above) and Other Control Measures (Part IV.C, above) where the following information is required for each item: Include detailed recordkeeping as appropriate; . . . Include inspection and maintenance schedules as appropriate.”

The Department agrees with these comments regarding the first use of the phrase “as appropriate” and has modified this phrase in Attachment A and A-1 of the final Tier A and Tier B MS4 NJPDES permits to read, “Include required recordkeeping.” The Department disagrees with the comments regarding the second use of the phrase “as appropriate” since not every Statewide Basic Requirement requires inspection and maintenance activities.

Regarding the stormwater program, the third paragraph of the General portion of Attachment A of the draft Tier B MS4 NJPDES permit states that:

“The Tier B permittee shall maintain a stormwater program that meets the Minimum Standard of each Statewide Basic Requirement (Part IV.B, above) and shall: . . . Include inspection and maintenance schedules, as appropriate.”

The Department maintains that the use of the phrase “as appropriate” in this instance is relevant since not every Statewide Basic Requirement requires inspection and maintenance activities.

As noted above, the Department has incorporated changes to the final Tier A and Tier B MS4 NJPDES permits to clarify language and has limited the use of the terms “as necessary,” “as appropriate” and “should” to contexts in which the language is applicable and clear.

34. **Comment:** Commenter 18 notes two different spellings of the word measurable (“measurable” and “measureable”) throughout the draft permit as well as in the Fact Sheet and Frequently Asked Question (FAQ) document. Commenter 18 recommends that the Department select one spelling for consistency. [18]

Response 34: As per the EPA federal rule at 40 CFR Part 122, the term “measurable” is used. The Department has corrected this spelling inconsistency to be consistent with the federal rule. Specifically, the Department has corrected this error in Part IV, Attachment A for Existing Permittees, Attachment A-1 for New Permittees and the FAQ for the final Tier A and Tier B MS4 NJPDES permits.

35. **Comment:** Commenter 18 questions if the Department expects to be updating the Tier A Municipal Guidance to incorporate new and updated information and notes that this guidance was originally published in 2004. If so, Commenter 18 questions if the Department expects to target those requirements that have been added to the draft permit (e.g. Aggregate Material and Construction Debris Storage, Street Sweepings, Catch Basin Clean Out and Other Material Storage, Yard Trimmings and Wood Waste Management Sites, Roadside Vegetation Management, etc.). Commenter 18 also asks if the Department expects to remove the guidance that might be obsolete such as permit requirements that are no longer applicable (e.g. Road Erosion Control). [18]

Response 35: The Department agrees that updates to the Tier A Municipal Guidance document are appropriate and anticipates release of a new guidance document subsequent to the release of the final Tier A MS4 NJPDES permit. This will include guidance to augment any new requirements as included in the Tier A MS4 NJPDES permit and will also delete guidance for permit requirements that are no longer applicable.

Fact Sheet

Tier A and Tier B MS4 NJPDES Permits

36. **Comment:** Commenter 18 states that regarding Section 2 of the Fact Sheet under Federal Stormwater Regulations, the Department indicates that no urban areas in New Jersey qualify as large or medium MS4s. However, because 40 CFR Part 212 Appendices G and H list places in New Jersey which satisfy the definitions of large or medium MS4s (as set forth in 40 CFR 122.26(b)), these findings should be revisited. Additionally, it would be helpful if the Department identified “places” permitted under the MS4 Phase I program. [18]

Response 36: The Department maintains that the Fact Sheet is correct and that there are only small MS4s in New Jersey. This is based on the fact that 40 CFR 122.26(a)7 states that combined sewer systems are not subject to the provisions of 40 CFR 122.26 (Stormwater discharges applicable to State NPDES programs). Those urban areas in New Jersey which would otherwise qualify as large or medium MS4s under the MS4 Phase I program based on population do not qualify because they are served primarily by combined sewer systems rather than separate sewer systems. These municipalities are Newark, Jersey City, Paterson, and Elizabeth.

No changes have been made to the final permits as a result of these comments.

37. **Comment:** Regarding Section 5.C of the Fact Sheet under Identification of Tier A Municipalities, Tier Assignment, the Department is still using the 2000 Census to assign tiers. Commenter 18 asks that the Department explain when it expects to complete the update of the list of Phase II MS4s based on the 2010 census. [18]

Response 37: The Department acknowledges that a new census was conducted by the United States Census Bureau in 2010 which was subsequent to the issuance of the 2009 Tier A and Tier

B MS4 NJPDES permits. However, itemizing tier reassignments is outside the scope of the Tier A and Tier B MS4 NJPDES permit process since the determination of eligibility for a Tier A or Tier B designation is set forth within the NJPDES Regulations at N.J.A.C. 7:14A-25.3. Specifically, N.J.A.C. 7:14A-25.3(a)3 includes a table that lists tier assignments for each municipality and establishes a tier reassignment process. To detail potential reassignments in the Fact Sheet as part of the draft permit process may have engendered confusion among named municipalities and other interested parties as to whether the Fact Sheet could be construed as formal notice of reassignment under N.J.A.C. 7:14A-25. Also, actual reassignment of a municipality cannot be effected until both the Tier A and Tier B MS4 NJPDES permits are renewed. In sum, any such reassignment based on the 2010 Census would be subsequent to the issuance of the final Tier A and Tier B MS4 NJPDES master general permits.

No changes have been made to the final permits as a result of these comments.

38. **Comment:** Commenter 22 states that Section 5.C of the Fact Sheet fails to notify readers about the significant issues pertaining to determining municipal tier assignments. Commenter 22 notes that it is of particular concern that Section 5.C fails to:

- (i) name and provide relevant 2010 Census data for the municipalities whose tier assignment is “under review”;
- (ii) identify the specific N.J.A.C. 7:14A-25.3 provisions relevant to this “review”; and
- (iii) briefly set forth what the Department believes are the significant factual, legal, methodological, and/or policy considerations in this “review.”

Commenter 22 also states that Section 5.C of the Fact Sheet fails to name the municipalities whose tier assignment are under review by the Department. The Department did notify twelve potentially affected municipalities by letter on February 14, 2017 and by email on February 15, 2017 in relation to the draft Tier A and Tier B MS4 NJPDES permit renewal public notice that they “could be reassigned” as the result of this “review.” This included nine Tier B municipalities (Allamuchy, Chesterfield, Elk Township, Elmer Borough, Hopewell Borough, Lambertville, Upper Freehold Township Woodbine and Woolwich) and three Tier A municipalities (Hi-Nella, Newton and Pittsgrove). Commenter 22 further states that the words from Section 5.C of the Fact Sheet, “the designation of Tier A or Tier B municipalities in that [existing Tier A MS4 NJPDES] permit” are erroneous. It is N.J.A.C. 7:14A-25.3, not any version of the Tier A MS4 NJPDES permit, that assigns all municipalities either to Tier A or Tier B. At least until February 28, 2014, when the existing Tier A Permit issued in 2009 expired, this existing permit would have been available to municipalities assigned to Tier A based on the 2010 Decennial Census.

Commenter 22 states that Section 5.C of the Fact Sheet acknowledges that Tier A assignments under N.J.A.C. 7:14A-25.3 are “based on federal rules.” The federal rule at 40 CFR 122.32(a)(1) states: “Your small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census” where the 2010 Decennial Census is the “latest Decennial Census.” Based upon the Department’s response to OPRA requests, the Department knew the identity of the twelve municipalities affected by the 2010 Census and could have

completed the tier assignment review as early as mid-2013 and certainly before the development of the Fact Sheet.

The Fact Sheet states that the Census was updated in 2010 and the application of the criteria under N.J.A.C. 7:14A-25.3 is under review by the Department. N.J.A.C. 7:14A-25.3(a)1.i is the relevant provision and states:

“1. An entire municipality is assigned to Tier A if that municipality:

- i. Is located entirely or partially within an urbanized area as determined by the 2000 Decennial Census by the Bureau of the Census or a subsequent and superseding Decennial Census, and has a population of at least 1,000 within an urbanized area as determined by that Census;”

Commenter 22 states that regarding the three Tier A municipalities specified above, the EPA statement as included in the December 8, 1999 Federal Register preamble to EPA’s NPDES stormwater rule adoption must be noted:

“Additional designations based on subsequent census years will be governed by the Bureau of the Census’ definition of an urbanized area in effect for that year. Based on historical trends, EPA expects that any area determined by the Bureau of the Census to be included within an urbanized area as of the 1990 Census will not later be excluded from the urbanized area as of the 2000 Census. However, it is important to note that even if this situation were to occur, for example, due to a possible change in the Bureau of the Census’ urbanized area definition, a small MS4 that is automatically designated into the NPDES program for storm water under an urbanized area calculation for any given Census year will remain regulated regardless of the results of subsequent urbanized area calculations.” (64 Fed. Reg. 68751)

This statement, however, conflicts with the pertinent EPA rule at 40 CFR 122.32(a)(1), which begins “Your small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census...”

In summary, Commenter 22 questions why these municipalities have not been reassigned and contends that there is no legitimate reason why the application of the criteria under N.J.A.C. 7:14A-25.3 is still under review by the Department in 2017. Commenter 22 states that there is no basis for the Department to use the 2000 Census rather than the 2010 Census as related to N.J.A.C. 7:14A-25.3(a)1.i. To be fair to the residents, taxpayers, and officials of these municipalities and to the general public, the Department must complete the tier assignment review and present its outcome before or concurrently with a final permit decision, so that all concerned have accurate and up-to-date information. Commenter 22 raises a similar comment with respect to the Tier B MS4 NJPDES permit and notes that the associated Tier B Fact Sheet does not acknowledge the 2010 Census. [22]

Response 38: Tier reassignment is discussed in the Fact Sheet of both the Tier A and Tier B MS4 NJPDES permits and that section acknowledges that a new census was conducted by the

US Census Bureau in 2010. However, the determination of eligibility for a Tier A or Tier B designation is set forth in N.J.A.C. 7:14A-25.3 (as noted by Commenter 22) and not in the Tier A or Tier B permits. N.J.A.C. 7:14A-25.3(a)3 includes a table that lists tier assignments and states that:

“The Department shall publish in the New Jersey Register a notice of administrative change revising the list of Tier A and Tier B municipalities in the table below, and shall mail notice of such revision to the affected municipality(ies) and county(ies). Each notice under this paragraph shall identify the reason for the revision...”

As noted above and described in detail in **Response 37**, itemizing tier reassignments is outside the scope of the Tier A and Tier B renewal permit process and must be preceded by a notice of regulatory change in the New Jersey Register. Any such reassignment would occur subsequent to the issuance of the final Tier A and Tier B MS4 NJPDES permits.

However, the Department does agree with Commenter 22 in that a minor clarification should be incorporated to Section 5.C of the Fact Sheet. Note that this same paragraph is included in Section 5.C of the Fact Sheet for the Tier B MS4 NJPDES permit although the first sentence references the Tier B MS4 NJPDES permit. Since the Fact Sheet is not part of the final permits, the following change is hereby incorporated into the Administrative Record for Section 5.C:

“Since the existing Tier A MS4 NJPDES permit was issued in 2009, the designation of Tier A or Tier B municipalities in that permit was based on N.J.A.C. 7:14A-25.3 as consistent with the 2000 Decennial Census. A listing of Tier A Municipalities that were issued the 2009 Tier A MS4 NJPDES permit is located at www.nj.gov/dep/dwq/msrp_home.htm consistent with N.J.A.C. 7:14A-25.2. Since the Census was updated in 2010, the application of the criteria under N.J.A.C. 7:14A-25.3 (where Tier A assignments are based on federal rules) is under review by the DEP [Department of Environmental Protection]. No reassignments are being implemented at this time.”

That being said, the Department has compiled a list of Tier Assignments based on the 2010 Decennial Census. Subsequent to the issuance of the final Tier A and Tier B MS4 NJPDES permits, any reassignment from Tier B to Tier A must be consistent with the process at N.J.A.C. 7:14A-25.3(a)(3). If that is the case, the Department will issue a separate notice to that municipality with information regarding the submission of a Request for Authorization (RFA) under the Tier A MS4 NJPDES permit. If a municipality receives notice from the Department that it has been reassigned from Tier B to Tier A, the deadline to submit an RFA is 180 days after the receipt of that notice unless otherwise specified in that notice. In fact, the Tier A MS4 NJPDES permit contains an implementation schedule as set forth in Attachment A-1 (Measurable Goals and Implementation Schedule for New Permittees) specifically for those municipalities that are being reassigned from Tier B to Tier A. Timeframes for implementation as established in Attachment A-1 are generally modeled after the original 2004 Tier A permit conditions since the 2004 permit conditions were originally designed for permittees that were developing a new stormwater program.

Subsequent to the issuance of the final Tier A and Tier B MS4 NJPDES permits, any reassignment from Tier A to Tier B must be consistent with the process at N.J.A.C. 7:14A-25.8(b)(1). If a municipality receives notice from the Department that it has been reassigned from Tier A to Tier B, the deadline to submit an RFA is 90 days after the receipt of that notice. Upon receipt of the RFA, the Department will issue the appropriate authorization.

No changes have been made to the final permits as a result of this comment.

39. **Comment:** Commenter 22 states N.J.A.C. 7:14A-25.3(a)1 provides in part that “an entire municipality is assigned to Tier A if that municipality” meets the regulatory criteria which includes N.J.A.C. 7:14A-25.3(a)(1)iii and is stated as follows:

“iii. Has a stormwater sewer system discharging directly into the salt waters of Monmouth, Ocean, Atlantic, or Cape May counties (using the N.J.A.C. 7:22A-1.4 definitions of “stormwater sewer system” and “salt waters”). A municipality is deemed to have such a system if that municipality is one of the “Affected Municipalities” listed in N.J.A.C. 7:22A Appendix A, unless it is determined in response to a petition under N.J.A.C. 7:22A-3.2(b) or 4.9(b) that N.J.A.C. 7:22A Appendix A erroneously includes or omits the municipality;”

Commenter 22 states that under both the 2000 Census and the 2010 Census, some municipalities have been assigned to Tier A for this reason alone. Note, however, that N.J.A.C. 7:14A-25.3(a)1iii refers to several provisions of N.J.A.C. 7:22A, Sewage Infrastructure Improvement Act (SIIA) Grants, which the Department allowed to expire on April 21, 2013. Commenter 22 states that the final permit decision for the Tier A MS4 NJPDES permit must set forth the reasons why the Department believes N.J.A.C. 7:14A-25.3(a)1iii is still valid even though it refers to the now expired SIIA rule.

Commenter 22 includes a similar comment for the Tier B MS4 NJPDES permit. [22]

Response 39: While the definition of “salt waters” refers to the expired SIIA rule, the definition of “saline waters” is found in the Surface Water Quality Standards (N.J.A.C. 7:9B) and in the NJPDES regulations (N.J.A.C. 7:14A). The terms “salt waters” and “saline waters” are identical in meaning both being defined as “waters having salinities generally greater than 3.5 parts per thousand at mean high tide.” The Department asserts that it is not the SIIA rule, which purpose was to administer a grant program, but the saline waters classification that warrants the protection provided by the continued assignment of these coastal area municipalities to Tier A. The waters in these coastal areas are also heavily utilized for recreation, with seasonal population increases that substantiate the continuation of Tier A status in these municipalities, independent of the expired SIIA rule. The Department has determined that the “Affected Municipalities” listed in Appendix A of N.J.A.C. 7:22A SIIA Grants, through which municipalities were assigned to Tier A based on discharges from their small MS4s to the salt/saline waters of Monmouth, Ocean, Atlantic and Cape May Counties, shall remain authorized under the Tier A MS4 NJPDES permit. The Department has based this determination on the fact that continued protection of water quality in these coastal areas necessitates that each municipality maintain its current municipal stormwater program under the Tier A MS4 NJPDES permit.

The determination that these coastal area municipalities shall remain authorized under the Tier A MS4 NJPDES permit was also made in accordance with N.J.A.C. 7:14A-25.2(a)4ii (special designations) and N.J.A.C. 7:14A-24.2(a)7ii (provision that the Department may determine that a category of stormwater discharges within a geographic area is a significant contributor of pollutants to surface water). This response also applies to the Tier B MS4 NJPDES permit. This is in keeping with the Department's authority under the Water Pollution Control Act, N.J.S.A. 58:10A-2, and the Stormwater Management Act, N.J.S.A. 40:55D-95.¹

No changes have been made to the final permits as a result of this comment.

40. **Comment:** Regarding the summary of the Federal Stormwater Regulations as included in the Fact Sheet of the Tier A MS4 NJPDES permit, Commenter 18 suggests the following change to the first sentence to reflect revisions made by the MS4 Remand Rule to the Phase II regulations at 40 CFR 122.34(a): “The federal Phase II Rule at 40 CFR 122.34 requires small MS4 permits to include the requirements that ensure permittees implement or continue to implement six minimum control measures to minimize the amount of pollutants discharged into receiving waterbodies from small MS4s.” [18]

Response 40: The Department disagrees that the suggested language in this comment for the Fact Sheet of the Tier A MS4 NJPDES permit should be changed. The language in question is as follows:

“Consistent with the EPA Phase II stormwater rules for small MS4s, the NJPDES regulations at N.J.A.C. 7:14A-25 outline in broad terms what must be included in NJPDES MS4 permits.”

This language was intended to provide a general description of the federal requirements and introduce the six minimum control measures. Pages 3 and 4 of the Fact Sheet explain the two alternative approaches that a permitting authority can use to issue NPDES general permits as required by the Remand Rule, and explains that the draft Tier A MS4 permit is a Comprehensive General Permit under 40 CFR 122.28. The Fact Sheet then states on page 13 “The Department provides an appropriate level of specificity...by specifying BMPs, measurable goals, and implementation schedules for these SBRs and other measures.” Therefore, the Fact Sheet adequately explains how the permit meets the requirements of the Remand Rule and no changes are warranted.

No changes have been made to the final permits as a result of this comment.

¹ In the Sewage Infrastructure Improvement Act, which did not expire, the Legislature found that “that nonpoint sources of pollution represent a significant environmental problem by contributing greatly to the biological and chemical degradation of coastal and other surface waters of the State”, and “that nonpoint source discharges into stormwater sewers, particularly during and after storms, result in elevated levels of bacteria, which are a cause of 80% to 90% of all beach closings.” N.J.S.A. 58:24-25.

41. **Comment:** Regarding Section 6.C of the Fact Sheet of the Tier A MS4 NJPDES permit under Use of Best Management Practices to Reduce Pollutants to Maximum Extent Practicable, in the fourth line of the first paragraph Commenter 18 asks that the language be changed as follows:

“and 40 CFR 122.34(a)) stipulate among other things that...”

Additionally, in this same paragraph Commenter 18 asks that the language be modified as follows for purposes of clarity:

“to ensure compliance with New Jersey’s Statewide Basic Requirements (SBRs),...”

Finally, the Department might find it helpful to refer to 40 CFR 122.41, which identifies conditions applicable to all NPDES permits. [18]

Response 41: This section of the permit is a summary of federal and state regulations within the Fact Sheet under the section which serves as an overview of MS4 permit requirements. The Department agrees that the first two suggested revisions serve to clarify the federal regulations. While the Fact Sheet is not part of the final permit documents, the Department is hereby acknowledging these changes for the purposes of the Administrative Record:

“Consistent with the EPA Phase II stormwater rules for small MS4s, the NJPDES regulations at N.J.A.C. 7:14A-25 outline in broad terms what must be included in NJPDES MS4 permits. Beginning with the issuance of the 2004 MS4 NJPDES permits, the Department has been prescriptive in its approach to defining Tier A MS4 NJPDES permit conditions. This is partly due to the fact that state and federal regulations (N.J.A.C. 7:14A-25.6(a)1 and 40 CFR 122.34(a)) stipulate among other things that compliance with the standard of reducing pollutants to the maximum extent practicable is accomplished through the implementation of BMPs or control measures. This draft Tier A MS4 NJPDES permit is a Comprehensive General Permit (under 40 CFR 122.28) which requires Tier A Municipalities to develop, update, implement and enforce a stormwater program (as documented in an SPPP) to ensure compliance with New Jersey’s Statewide Basic Requirements (SBRs), Other Control Measures, Additional Measures, and Optional Measures...”

Regarding the suggestion that a reference to 40 CFR 122.41 be included, the Department maintains that this reference to conditions applicable to all NPDES permit is rather broad and therefore not appropriate for this specific context within this section.

No changes have been made to the final permits as a result of this comment.

42. **Comment:** Commenter 22 states N.J.A.C. 7:14A-15.8 requires that the Fact Sheet for the Tier A MS4 NJPDES permit briefly set forth significant considerations examined during preparation of the draft permit, and to describe briefly the type of facility which is the subject of the draft permit. Regarding the “municipal maintenance yard and other ancillary operations” (abbreviated as “MMY”) and “stormwater discharge associated with industrial activity,” the Fact Sheet is defective and not in compliance with N.J.A.C. 7:14A-15.8 because it fails to discuss

briefly which of the eleven categories of such discharge (as defined at N.J.A.C. 7:14A-1.2) are known to be from MMY and authorized under the Tier A MS4 NJPDES permit. Instead, Section 6.D of this Fact Sheet states:

“The draft Tier A MS4 NJPDES permit does not authorize “stormwater discharges associated with industrial activity” or “stormwater discharges associated with construction activity” as described in Part II.A.3. Any Tier A Municipality that operates an industrial facility or construction site with such a discharge must obtain a separate NJPDES permit for that discharge...”

Commenter 22 contends that these sentences are a poor, indirect way of saying that the draft Tier A MS4 NJPDES permit does authorize some “stormwater discharges associated with industrial activity.” The phrase “as described in Part II.A.3” merely leads the reader back to the vague and confusing “except as otherwise specifically provided in this permit” clause in Part II.A.3.a.i. In short, the Fact Sheet does not clarify what specific kinds of “stormwater discharges associated with industrial activity” are authorized by the draft Tier A MS4 NJPDES permit. In addition, the Fact Sheet fails to identify a valid regulatory basis for control of any “stormwater discharges associated with industrial activity” and Section 3.A (“Regulatory Background”) does not directly mention these discharges. N.J.A.C. 7:14A-25, N.J.A.C. 7:14A-25.6(a)1 and 40 CFR 122.34(a) apply to discharges from MS4s only whereas the regulatory basis for controlling “stormwater discharges associated with industrial activity” can be found elsewhere in N.J.A.C. 7:14A and 40 CFR 122.

Commenter 22 continues by stating that the Fact Sheet at Sections 6.D and 7.A.5.c is also defective for MMY and not in compliance with N.J.A.C. 7:14A-15.8. This is because the Fact Sheet fails to discuss briefly which kinds of MMY stormwater discharges require a NJPDES permit and fails to affirm that the MMY provisions have no legal force with respect to MMY stormwater discharges that do not require a NJPDES permit. In addition, the Fact Sheet fails to identify a valid regulatory basis for the draft permit conditions for stormwater discharges from MMY that are not also stormwater discharges from MS4s. For example, the following paragraph is included in Section 3.A (“Regulatory Background”):

“To protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act, the MS4 State rules (N.J.A.C. 7:14A-25) require the Department to issue permits regulating each small MS4. These MS4 permits specify the minimum control measures that must be implemented by the permittee. These control measures serve to reduce the discharge of pollutants from the Tier A Municipality’s MS4, municipal maintenance yards and other ancillary operations, to the maximum extent practicable pursuant to N.J.A.C. 7:14A-25.6(a)1 and 40 CFR 122.34(a) to protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act. The benefit of this approach was described in the NJPDES rule adoption notice published in the February 2, 2004 New Jersey Register (see 36 N.J.R. 828-829).”

Commenter 22 states that the problem with this paragraph is that “the MS4 State rules (N.J.A.C. 7:14A-25),” N.J.A.C. 7:14A-25.6(a)1, and 40 CFR 122.34(a) apply to discharges from MS4s

only, and do not apply to discharges from MMY that are not also discharges from small MS4s. The regulatory basis for controlling discharges from MMY that are not also discharges from small MS4s can be found elsewhere in N.J.A.C. 7:14A and related EPA regulations. [22]

Response 42: The Department disagrees with these comments and maintains that the Fact Sheet along with Attachment E appropriately identifies relevant information regarding MMY and “stormwater discharge associated with industrial activity.” The following is an excerpt from the Fact Sheet:

“Consistent with 40 CFR 122.34(b)(6) and N.J.A.C. 7:14A-25.6, each iteration of New Jersey’s Tier A MS4 NJPDES permit since 2004 has included requirements related to municipal maintenance yard operations. N.J.A.C. 7:14A-25.6(b)7 states:

‘Maintenance yards and highway service areas: The permittee shall develop and implement an operation and maintenance program that prevents or reduces pollutant runoff from maintenance yards and highway service areas owned or operated by the permittee.’

At Part IV.B.5.c of this draft Tier A MS4 NJPDES permit, these requirements are presented and renamed “Municipal Maintenance Yards and Other Ancillary Operations.” This permit condition presents a simple (but expanded) list of activities to better represent common activities at municipal yards; and unifies all applicable BMP’s and control measures in Attachment E (Best Management Practices for Municipal Maintenance Yards and Other Ancillary Operations). Based on information garnered from site inspections as well as input from field inspectors, the 2009 Tier A MS4 NJPDES permit does not accurately represent all the activities at municipal maintenance yard locations. This draft Tier A MS4 NJPDES permit proposes to remedy this gap by expanding this section as well as by including BMPs or control measures that must be implemented to minimize or eliminate pollutant exposure to stormwater for each activity in Attachment E. Attachment E (Best Management Practices for Municipal Maintenance Yards and Other Ancillary Operations) is written so that it can be distributed to and utilized by maintenance yard employees.

The Department has determined that expanding coverage under this draft Tier A MS4 NJPDES permit for additional activities commonly occurring at municipal yards is appropriate since such activities can be a significant contributor of pollutants to surface water if not managed properly (see N.J.A.C. 7:14A-24.2(a)). These activities could be otherwise regulated under individual permits but the Department has determined that this general permit is the most efficient and appropriate means by which the Department can regulate a large number of similar dischargers (see also N.J.A.C. 7:14A- 6.13).”

The Department acknowledges that Commenter 22 is suggesting that the Fact Sheet identify one of the eleven categories under “stormwater discharge associated with industrial activity,” as defined at N.J.A.C. 7:14A-1.2, for the purposes of justifying the inclusion of permit conditions for the municipal maintenance yard. However, the Department maintains that it is appropriate and reasonable to include conditions for municipal maintenance yards yet continue the exclusion

for “stormwater discharge associated with industrial activity” as included in Part II.A.3.a.i and discussed further in **Response 50**. N.J.A.C. 7:14A-15.8 does provide guidance as to what information should be included in a Fact Sheet; however, this regulation does not mandate that a detailed description of potential wastestreams be included. Because the operations taking place at municipal maintenance yards and other ancillary operations vary depending on the facility, it is impossible to provide an accurate description of all specific types of facilities that are regulated by this permit. To remedy this, the Fact Sheet discusses the various operations that are covered under the permit.

The municipal maintenance yard is run by the Tier A Municipality and the Department determined that expanding coverage under the Tier A MS4 NJPDES permit for additional activities commonly occurring at municipal yards is appropriate since such activities can be a significant contributor of pollutants to surface water if not managed properly as described in the Fact Sheet excerpt above. Inclusion of this more comprehensive set of activities for municipal yards is also consistent with 40 CFR 122.34(b)(6) i and ii (emphasis added) which state:

“The permit must identify the minimum elements and require the development and implementation of an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations.”

“consider the following in developing your program: . . . controls for reducing or eliminating the discharge of pollutants from . . . maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas . . . procedures for properly disposing of waste removed from the separate storm sewers and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris) . . .”

In sum, the Department maintains that the Fact Sheet is appropriate as written and provides a valid regulatory basis for the continued coverage of the municipal maintenance yard as in previous iterations of the Tier A MS4 NJPDES permit. The Department also maintains that inclusion of these best management practices and other control measures do apply to discharges from municipal maintenance yards that do not discharge to the MS4 system. Please refer to **Response 50** regarding additional information on this topic.

No changes have been made to the final permit as a result of this comment.

43. **Comment:** Commenter 18 states that Section 7.A.3 of the Fact Sheet for the Tier A MS4 NJPDES permit concerns Minimum Standards for Construction Site Storm Water Runoff. With respect to the minimum control measure for construction site storm water runoff control (40 CFR 122.34(b)(4)), Commenter 18 notes that the Department indicates this measure is covered under the Department’s Construction Activity Stormwater General Permit (Construction Activity Permit) (NJPDES Permit No. NJ0088323). Commenter 18 cross checked the Construction Activity Permit with the draft MS4 NJPDES permit and could not with confidence conclude that the Construction Activity Permit contains all of the of the six required elements for the draft MS4 NJPDES permit set forth at 40 CFR 122.34(4)(i)(A) – (F). Commenter 18 asks that the

Department demonstrate with cross referencing that all six elements are in the Construction Activity Permit and have sufficient utility. [18]

Response 43: The Department agrees that construction site runoff control is one of the six minimum control measures under 40 CFR 122.34(b)(4). As noted in this comment, the Department includes the control measures in a separate stormwater general permit, namely the “Construction Activity Permit” (NJPDES Permit No. NJ0088323), as allowable under state regulations where those permit conditions are consistent with federal regulations. This general permit authorizes point source discharges from certain construction activities. Regulated entities are required to develop a soil erosion and sediment control plan aimed at eliminating the flow of contaminated rainwater into streams and rivers. 40 CFR 122.34(b)(4)(i)(A)–(F) contains the following requirements:

- (A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law;
- (B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;
- (C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;
- (D) Procedures for site plan review which incorporate consideration of potential water quality impacts;
- (E) Procedures for receipt and consideration of information submitted by the public, and
- (F) Procedures for site inspection and enforcement of control measures.

While this permit is not the subject of this Response to Comments document for the Tier A MS4 NJPDES permit, the Department maintains that all six elements are addressed in the Construction Activity Permit. Additional detail regarding the Construction Activity Permit is included in **Response 102-103**.

No changes have been made to the final permits as a result of this comment.

44. **Comment:** Commenter 18 states that Section 7.A.6 of the Fact Sheet of the Tier A MS4 NJPDES permit concerns Minimum Standards for MS4 Outfall Pipe Mapping as well as Illicit Discharge and Scouring Detection and Control. Commenter 18 notes that the Department identifies a federal requirement to show the location of “all surface water bodies” receiving discharges from outfall pipes, namely 40 CFR 122.34(b)(3)(i)(A). In the next sentence, the Department identifies federal requirements for the submission of an outfall map, namely 40 CFR 122.33(b)(1) and 122.28(b)(2). In order to accurately reference 40 CFR 122.34(b)(3)(i)(A), Commenter 18 asks that the Department replace “all surface water bodies” with “all waters of the United States.” [18]

Response 44: The Department disagrees that it is appropriate to replace “all surface water bodies” with “all waters of the United States.” N.J.A.C. 7:14A-25.6(b)5.i requires the MS4 Outfall Pipe Map to “show the location (and name, where known to the permittee) of all surface water bodies receiving discharges from those outfall pipes.” N.J.A.C. 7:14-1.2 defines surface water as “water at or above the land's surface which is neither ground water nor contained within the unsaturated zone, including, but not limited to, the ocean and its tributaries, all springs, streams, rivers, lakes, ponds, wetlands, and artificial waterbodies.” This definition is intended to include those water bodies that would be considered “waters of the United States.”

In addition, the sentence in question specifically states, “The requirement to show the location (and name, where known to the municipality) of all surface water bodies receiving discharges from those outfall pipes is consistent with state and federal regulations...” This statement is intended only to explain that the terms and conditions in the Tier A MS4 NJPDES permit meet the minimum state and federal requirements and is not intended to explain the exact requirements of the federal rules.

No changes have been made to the final permits as a result of this comment.

45. **Comment:** Commenter 18 states that Section 7.B.3.b of the Fact Sheet of the Tier A MS4 NJPDES permit concerns addressing TMDLs through the Tier A MS4 NJPDES permit where the Department cites 40 CFR 122.34(a) as to what MS4 requirements should be based on. For purposes of clarity as to the meaning and language of this provision, Commenter 18 suggests that the Department revisit these remarks and makes appropriate adjustments. [18]

Response 45: 40 CFR 122.34 is entitled “Permit requirements for regulated small MS4 permits” and lists general requirements. The section in question from 40 CFR 122.34(a) as raised by this commenter is the first sentence in the following excerpt:

“In accordance with 40 CFR 122.34(a), the MS4 requirements should be based on the evaluation of, among other things, current water quality criteria conditions and permittee compliance TMDLs are linked to water quality conditions and must be understood by permittees. Despite this, the Department has determined that there is a lack of awareness among municipal representatives regarding TMDLs in waterbodies within a Tier A Municipality despite their relation to the MS4 system. This is partially due to the fact that TMDLs are apportioned to a specific watershed which does not typically match Tier A Municipality borders...”

The Department did not intend to include an exhaustive list of all general requirements for permits issued to MS4 systems within this section of the Fact Sheet but rather wanted to highlight that awareness of applicable TMDLs is within the authority of 40 CFR 122.34(a). The Department maintains that the reference to 40 CFR 122.34(a) is used appropriately and no changes are needed.

No changes have been made to the final permits as a result of this comment.

46. **Comment:** Commenter 18 states that the TMDL Look-up Tool referenced in Section 7.B.3.c of the Fact Sheet and in Part IV.C.2 must include information for the Delaware River Zones 2 to Zones 5 and 6. Specifically, the tool should include Total Maximum Daily Loads for polychlorinated biphenyls (PCBs) for Zones 2 to 5 of the Tidal Delaware River (established by EPA in December 2003) and Total Maximum Daily Loads for polychlorinated biphenyls (PCBs) for Zone 6 of the Tidal Delaware River (established by EPA in December 2006). [18]

Response 46: The Department's TMDL Look-Up Tool uses GIS data to identify approved and adopted TMDLs applicable to each municipality. New TMDL information will be included over time as the tool is updated. Although the TMDLs referenced in this comment were not in the tool at the time that the draft Tier A and Tier B MS4 NJPDES permits were issued, the TMDLs for PCBs for Zones 2-5 of the Tidal Delaware River and the TMDL for PCBs for Zone 6 of the Tidal Delaware River will be added to the tool in future updates.

No changes have been made to the final permit as a result of this comment.

47. **Comment:** Regarding the Tier B MS4 NJPDES permit, Commenter 18 states that the TMDL Look-up Tool should be included in the Fact Sheet and the Tier B MS4 NJPDES permit. Specifically, the tool should include Total Maximum Daily Loads for PCBs for Zones 2 to 5 of the Tidal Delaware River (established by EPA in December 2003) and Total Maximum Daily Loads for PCBs for Zone 6 of the Tidal Delaware River (established by EPA in December 2006). [18]

Response 47: The Department disagrees that the TMDL Look-Up Tool should be specifically included in the Tier B MS4 NJPDES permit and associated Fact Sheet. Use of the TMDL Look-Up Tool is not a requirement of the Tier B MS4 NJPDES permit at this time. Rather, it is a tool that is available for use to aid Tier A Municipalities in complying with the requirements in Part IV.C.2 of the Tier A MS4 NJPDES permit. Tier B Municipalities tend to be located in more rural and non-coastal areas and the requirements of the Tier B MS4 NJPDES permit are not as extensive as the Tier A MS4 NJPDES permit. In fact, the NJPDES rules at N.J.A.C. 7:14A-25 only list two Statewide Basic Requirements for Tier B Municipalities, Post-Construction Stormwater Management in New Development and Redevelopment and Local Public Education and Outreach.

However, Tier B Municipalities do have the option of using the tool to identify applicable TMDLs to gather information regarding the waterways within their municipality. Additionally, Tier B Municipalities can use the TMDL Look-up Tool in the event that a TMDL expressly requires a Tier B Municipality to include an Additional Measure; or if the municipality chooses to use the information in the TMDLs to identify Optional Measures. As noted in **Response 46**, the Department does intend to include these TMDLs in a future update of the tool.

No changes have been made to the final permit as a result of this comment.

48. **Comment:** Part 7.D of the Fact Sheet concerns Optional Measures. Commenter 18 asks that municipalities evaluate the impact of direct discharges on downstream water quality and track their progress in reducing stormwater loadings for waters with a TMDL, that are listed as impaired, that are on the State's 303(d) list, or have in place other pollutant reduction plans approved by the Department. Commenter 18 suggests that the Department consider requiring a modest level of municipal outfall monitoring in the MS4 permit similar to Connecticut's MS4 program (www.ct.gov/deep/lib/deep/Permits_and_Licenses/Water_Discharge_General_Permits/MS4.gp.pdf). Commenter 18 also suggests cooperation with active citizen and non-government organization water quality monitoring programs (where available) as this can furnish valuable information if provided guidance by the Department. [18]

Response 48: Please refer to **Response 15-16.**

Part I: General Requirements: NJPDES

Tier A and Tier B MS4 NJPDES Permits

49. **Comment:** Part I.A.1 lists "Requirements Incorporated by Reference." Commenter 18 states that the following four enumerated requirements found in the currently effective Tier A MS4 NJPDES permit Part I.I.1 (NJ0141852) were not carried over to the draft permit: (i), which lists general permit requirements; and (xx), (xxi) and (xxii), which deal with underground injection issues. Commenter 18 asks that the Department explain why these four requirements were not included in the draft Tier A MS4 NJPDES permit and, if relevant, that they be included. [18]

Response 49: Part I.1.a from the expired 2009 Tier A MS4 NJPDES permit concerns general conditions that are incorporated by reference. As referenced in this comment, the conditions in Part I.1.a of the 2009 Tier A MS4 NJPDES permit correspond to "Part I General Requirements: NJPDES" in which similar general conditions are incorporated by reference. The following regulations were not included in Part I.A.1 of this Tier A MS4 permit renewal:

- "i. General Permits N.J.A.C. 7:14A-6.13
- xx. UIC Corrective Action N.J.A.C. 7:14A-8.4
- xxi. Additional Conditions Applicable to UIC Permits N.J.A.C. 7:14A-8.9
- xxii. UIC Operating Criteria N.J.A.C. 7:14A-8.16"

Note that these four items have not been omitted but rather are moved to a separate section of the permit within Part II.C.5 entitled "Additional Requirements Incorporated by reference" and are included as follows:

- "b. Conditions for General Permits at N.J.A.C. 7:14A-6.13, including the Department's authority to require, for due cause, a Tier A Municipality to apply for and obtain a different stormwater permit for specific activities otherwise authorized under this permit.

- c. Additional Conditions applicable to UIC permits at N.J.A.C. 7:14A-8.9, UIC Corrective Action (N.J.A.C. 7:14A-8.11) and UIC Operating Criteria (N.J.A.C. 7:14A-8.16).”

No changes have been made to the final permits as a result of this comment.

Part II: General Requirements: Discharge Categories

Tier A and Tier B MS4 NJPDES Permits

In order to address a technical issue in the New Jersey Environmental Management System software used by the Department to construct NJPDES permits, the Department reorganized Part II of the final Tier A and Tier B MS4 NJPDES permits. Note that the content of the sections remains intact from the draft Tier A and Tier B MS4 NJPDES permits within the section header with the exception of Additional Requirements Incorporated by Reference (which was formerly included as Part II.C.5 in the draft Tier A MS4 NJPDES permit). The reorganization in Part II of the final permit documents as compared to Part II of the draft permit documents is as follows:

- A. Additional Requirements Incorporated by Reference ~~Eligibility~~
- B. General Conditions ~~Administrative Process~~
- C. Eligibility ~~General Conditions~~
- D. Administrative Process

All references to Part II within the Response to Comments document remains consistent with the draft issuance documents. The final MS4 NJPDES permits will carry the new organization.

50. **Comment:** Commenter 22 states that stormwater discharges from “small MS4s” (Part II.A.2.a.i) and stormwater discharges from “municipal maintenance yards and other ancillary operations” (Part II.A.2.a.ii; abbreviated as “MMY”) are not mutually exclusive. Commenter 22 states that many stormwater discharges from MMY are also stormwater discharges from small MS4s, and have been regulated as such since 2004 in NJPDES small MS4 permits. For example, refer to the express references to “maintenance yards” in the NJPDES small MS4 rules at N.J.A.C. 7:14A-25.6(b)7, and in Part I.F.8 of the 2009 Tier A MS4 NJPDES permit.

However, Commenter 22 states that what Part II.A.2.a.ii of the draft Tier A MS4 NJPDES permit makes newly eligible for this permit are stormwater discharges from MMY that are not also stormwater discharges from small MS4s. These stormwater discharges from MMY fall into two categories. The first is stormwater discharge to surface water (DSW) from MMY that is also “stormwater discharge (or stormwater DSW) associated with industrial activity” as defined in the NJPDES rules at N.J.A.C. 7:14A-1.2. Examples may include stormwater DSW from MMY that manufacture organic fertilizer or recycle waste materials, and thus fall under subparagraphs 1ii or 1vi of the definition. The N.J.A.C. 7:14A-1.2 definition of “municipal separate storm sewer” expressly excludes separate storm sewers that are at industrial facilities and that convey such stormwater DSW. “Stormwater DSW associated with industrial activity” has long required a NJPDES permit (see, e.g., N.J.A.C. 7:14A-24.2(a)2, 24.4(a)1, and 24.7(a)).

Commenter 22 continues by stating that the second category is stormwater discharge from MMY that is not “stormwater DSW associated with industrial activity.” These stormwater discharges are also not discharged from a “separate storm sewer” because the stormwater instead soaks directly into the ground or is conveyed by sheet flow only. For this category, it is important to recognize that it is the NJPDES rules, not the Tier A MS4 NJPDES permit, that determine which discharges require a NJPDES permit. Making a certain kind of discharge “eligible” for a NJPDES permit, or listing activities (and their control measures) contributing to this discharge, does not, by itself, establish that this discharge requires a NJPDES permit.

N.J.A.C. 7:14A-24.2(a) lists the kinds of stormwater DSW and DGW (Discharge to Ground Water) that require a NJPDES permit under N.J.A.C. 7:14A-24, and N.J.A.C. 7:14A-24.2(c) lists stormwater discharges exempt from the requirement for a NJPDES permit. Under these provisions, stormwater DSW in the above mentioned “second category” are exempt unless the Department determines under N.J.A.C. 7:14A-24.2(a)7 that:

- i. Stormwater controls are needed for the point source discharge based on total maximum daily loads (TMDLs) that address the pollutant(s) of concern; or
- ii. The point or nonpoint source discharge, or category of discharges within a geographic area, contributes to a violation of a surface water quality standard, or is a significant contributor of pollutants to surface water;

In addition, stormwater DGW in the above mentioned “second category” are exempt if they are from MMY considered “commercial areas other than areas of high pollutant loading as described under N.J.A.C. 7:14A-7.4(b)5ii,” unless the Department determines under N.J.A.C. 7:14A-24.2(a)9 that “the discharge is likely to contravene the Groundwater Quality Standards at N.J.A.C. 7:9C, or may result in violation of the Surface Water Quality Standards at N.J.A.C. 7:9B.” Also, when the Department makes determinations under N.J.A.C. 7:14A-24.2(a)7 or (a)9, the Department must “notify the operating entity in writing of the reasons for such a determination” in accordance with N.J.A.C. 7:14A-24.2(b).

Commenter 22 continues by stating that the following do not constitute a determination by the Department under N.J.A.C. 7:14A-24.2(a)7 or (a)9, or “notify the operating entity in writing of the reasons for such a determination:”

- Listing stormwater discharges from MMY in Part II.A.2.a.ii.
- Listing various activities at MMY and their control measures in Part IV.B.5.c and Attachment E.
- The discussion of MMY in Sections 6.D and 7.a.5.c of the Fact Sheet for the draft Tier A MS4 NJPDES Permit.

Moreover, Commenter 22 states that if the Department makes this determination for most “second category” MMY operated by Tier A permittees, then to comply with the Administrative

Procedure Act, N.J.S.A. 52:14B-1 et seq., the Department should make this determination through rulemaking. The Department could take the more basic step of amending N.J.A.C. 7:14A-24.2(a) (and, for DSW, N.J.A.C. 7:14A-11.1(b)) to skip the “determination” step by expressly requiring a NJPDES permit for stormwater discharges to surface water and discharges to groundwater from these Tier A MMY. [22]

Response 50: This comment primarily concerns Part II.A.2.a.i which is stated as follows:

“2. Authorized Discharges Under the Tier A MS4 NJPDES Permit

- a. Eligible Stormwater Discharges – Except as provided in Part II.A.3 below, this permit authorizes all new and existing stormwater discharges to surface water and groundwater from:
 - i. Small MS4s (as defined at N.J.A.C. 7:14A-1.2) owned or operated by Tier A Municipalities; and
 - ii. Municipal maintenance yards and other ancillary operations (see Part IV.B.5.c) owned or operated by Tier A Municipalities.”

The Department disagrees that the inclusion of discharges from MMY is new to this permit renewal. In fact, each iteration of New Jersey’s Tier A MS4 NJPDES permit since 2004 has included requirements related to municipal maintenance yard operations which is consistent with 40 CFR 122.34(b)(6) and N.J.A.C. 7:14A-25.6. As detailed in the Fact Sheet regarding Part IV.B.5, the following represents a comparison of these requirements as compared to the 2009 Tier A MS4 NJPDES permit:

2009 SBR	Permit Renewal SBR
<p>Maintenance Yard Operations (including maintenance activities at Ancillary Operations) – Detailed in Attachment D</p> <ul style="list-style-type: none"> • De-icing material storage • Equipment vehicle washing • Standard operating procedures 	<p>Municipal maintenance yards and other ancillary operations – Detailed in Attachment E</p> <ul style="list-style-type: none"> • Inspections and good housekeeping • Fueling operations • Discharge of stormwater from secondary containment • Vehicle maintenance • Equipment and vehicle washing and wash wastewater containment • Salt and de-icing material storage and handling\ • Aggregate material storage

N.J.A.C. 7:14A-25.6 does not specify that this requirement applies only to municipal maintenance yards discharging to small MS4s as suggested in this comment. Rather, this requirement applies to all stormwater runoff-related pollutant discharges from municipal

maintenance yards owned and operated by the municipality. Stormwater discharges from municipal maintenance yards were eligible under the 2004 and 2009 Tier A MS4 NJPDES permits, as described in Part I.F.8 and Attachment D of those permits, and continue to be regulated under this Tier A MS4 NJPDES permit with improved and clarified permit conditions.

The Department has determined that utilizing the Tier A MS4 NJPDES permit is the most efficient and appropriate means of regulating municipal maintenance yards. The Tier A MS4 NJPDES permit continues to authorize stormwater discharges from municipal maintenance yards owned or operated by Tier A municipalities and specifies which BMPs are required to be implemented to prevent or reduce the discharge of pollutants in accordance with N.J.A.C. 7:14A-25.6(b)7. These activities could be otherwise regulated under individual permits but the Department has determined that this general permit is the most efficient and appropriate means by which the Department can regulate a large number of similar dischargers (see also N.J.A.C. 7:14A-6.13). In addition, the Department maintains that issuing an individual NJPDES permit to Tier A Municipalities for discharges from municipal maintenance yards would not necessarily result in any substantial water quality benefit as compared to a general NJPDES permit. The recordkeeping and reporting requirements and fees involved with a separate permit would impose an extra burden on municipalities, while providing water quality benefits equivalent to the level of protection under the Tier A MS4 NJPDES permit. Therefore, the Department has determined that due to the limited scope of these operations, utilizing the Tier A MS4 NJPDES permit is the most efficient and appropriate means by which the Department can regulate municipal maintenance yards and that this is in the best interest of both the Department and Tier A Municipalities. Also, a Tier A municipality is not exempt from the requirement to apply for another separate stormwater permit for any activity at municipal maintenance yards if required to do so, for due cause, by the Department.

No changes have been made to the permit as a result of this comment.

51. **Comment:** Commenter 22 states that making a certain kind of discharge “eligible” for a NJPDES permit, or listing activities (and their control measures) contributing to this discharge, does not, by itself, establish that this discharge requires a NJPDES permit. Commenter 22 states that the Department should recognize a second category, namely stormwater discharges from the MMY that is not “stormwater DSW associated with industrial activity,” but that is also not discharged from a “separate storm sewer” (because the stormwater instead soaks directly into the ground or is conveyed by sheet flow only). For this category, Commenter 22 states that it is the NJPDES regulations, not the Tier A MS4 NJPDES permit, that determines which discharges require a NJPDES permit.

Commenter 22 states that if the Department makes a determination for the “second category” MMY under N.J.A.C. 7:14A-24.2(a)7 or (a)9, then the Department should make the following changes to the permit:

- Any modifications to the requirements of the Tier A MS4 NJPDES permit after the effective date of permit authorization (EDPA), the implementation schedule for those changes would be based on the date of determination, not the EDPA.
- The Department should revise Part II.A.3.a.iv to read “Yard Trimmings and Wood Waste Management Sites that are not owned and operated solely by the Tier A Municipality.” As indicated by the N.J.A.C. 7:14A-1.2 definition of “operating entity,” it is quite possible for a facility to have more than one operating entity. For example, a Tier A Municipality might contract with a private firm to operate a Wood Waste Management Site, yet retain enough decision-making authority to still be one of the “operating entities” for that site. The draft Tier A MS4 NJPDES permit includes no provisions for private co-permittees under this Permit.
- Because Part II.A.2.a authorizes stormwater discharges from MMY that are not also stormwater discharges from MS4s, the Department should ensure that any references to MMY are added to Parts II.A.3.e.i and II.B.3.a.i. [22]

Response 51: The Department does not agree that Part II.A.2.a needs to be revised regarding the MMY conditions as suggested in this comment. Nonetheless, the following represents the Department’s response to specific comments raised in this comment:

- The Department maintains that the implementation schedule for the MMY conditions, as included in the Tier A MS4 NJPDES permit, is appropriately set at EDPA. The Department is not suggesting that alternate conditions be included as a future determination. However, in the event that the Department were to modify any MMY requirements after the EDPA in a future permit action, then the Department would appropriately modify the effective date of those requirements.
- The Department disagrees that Part II.A.3.a.iv should be revised. However, the Department agrees with the commenter’s assertion that the Tier A MS4 NJPDES permit does not include any provisions allowing for private co-permittees. The Tier A MS4 NJPDES permit covers only municipal maintenance yards owned and operated by Tier A Municipalities. Private operators are required to obtain their own NJPDES permit.
- The Department disagrees with the comment. Part II.A.2.a.ii of the draft Tier A MS4 NJPDES permit authorizes **stormwater discharges** (emphasis added) from municipal maintenance yards. Part II.A.3.e.i specifically refers to **non-stormwater** discharges that are contributors of pollutants. By definition, stormwater discharges from municipal maintenance yards do not fall under this category. Therefore, it would not be appropriate to add a reference to municipal maintenance yards in Part II.A.3.e.i. Part II.B.3.a.i states:

“A single RFA is required for the entire eligible discharge from the small MS4 owned or operated by and located within a single municipality. Multiple RFAs are not required for multiple municipal operations (e.g., municipally owned and operated maintenance yards or other ancillary operations, facilities, garages, and/or offices).”

Based on the above, there is no need to revise this section.

No changes have been made to the final permit as a result of this comment.

52. **Comment:** Commenter 22 states that MMY stormwater discharges in “combined sewer areas” should not be eligible for the Tier A MS4 NJPDES permit. If the Department believes that the individual NJPDES CSO permits issued in 2015 are deficient in respect to stormwater from MMY, the proper remedy is to change the NJPDES CSO permits, not to add “combined sewer area” MMY requirements to the Tier A MS4 NJPDES permit. [22]

Response 52: The Department disagrees with the comment and maintains that the Tier A MS4 NJPDES permit does not condition the permit requirements for municipal maintenance yards based on whether the stormwater discharges to a separate sewer system or a combined sewer system. This is discussed in **Response 50.**

Note that the terms and conditions of the NJPDES CSO permits are not the subject of public comment and notice for the Tier A MS4 NJPDES permit as addressed in this Response to Comments document.

No changes have been made to the final permit as a result of this comment.

53. **Comment:** Commenter 22 states that the draft Tier A MS4 NJPDES permit is missing the “combined sewer area” exclusion provision that was included in the 2009 Tier A MS4 NJPDES permit and, as a result, Parts IV.B.4.I, Part IV.C.1.a and Part IV.C.1.b overlap or conflict with the NJPDES CSO permits. The Fact Sheet, Attachment B, FAQ and Crosswalk documents do not expressly discuss the issue of how and why this draft permit applies to areas served by combined sewer systems (CSS). The draft Tier A MS4 NJPDES Permit does not mention individual NJPDES CSO permits, and is not accompanied by any Department proposal to change individual NJPDES CSO permits to eliminate overlap. The overlap in the CSO and MS4 permits is confusing and unreasonable due to the difference in language and substance of specific requirements. For example, the CSO permits require "implementation of a regular street cleaning program;" however, Part IV.B.5.b of the Tier A NJPDES MS4 permit includes specific street sweeping and maintenance of catch basins and storm drain inlets.

Commenter 22 contends that using the Tier A MS4 NJPDES permit to require Tier A Municipalities to regulate stormwater discharges and facilities in a “combined sewer area” is unlawful and otherwise inappropriate not only because these discharges and facilities do not contribute to any discharge “authorized” by this permit, but also because these stormwater discharges and facilities are already substantially regulated under NJPDES CSO permits. Commenter 22 states that this occurs especially where the Tier A Municipality is both the NJPDES CSO permittee and the NJPDES Tier A MS4 permittee. Commenter 22 interprets N.J.S.A. 58:10A-6.a as establishing that a discharge fully authorized by one NJPDES permit is not subject to another NJPDES permit. The individual NJPDES CSO permits issued by the Department in March 2015 to owners and operators of CSO outfalls authorize discharges from

CSOs, including stormwater in those discharges. Moreover, certain conditions in these individual NJPDES CSO permits require the permittee to perform substantial work to control stormwater discharges into CSS, and to operate and maintain stormwater facilities properly.

Commenter 22 questions the regulatory basis for “combined sewer area” in the draft Tier A MS4 NJPDES permit and contends that this basis cannot be the two stormwater subchapters of the NJPDES rules, N.J.A.C. 7:14A-24 and -25. Commenter 22 notes that N.J.A.C. 7:14A-24.2(f) is stated as follows:

“(f) Combined sewer systems that discharge to waters of the State are point sources that require NJPDES permits applied for in accordance with N.J.A.C. 7:14A-4, and are not subject to the provisions of this subchapter or N.J.A.C. 7:14A-25. Stormwater discharges to combined or sanitary sewer systems are not subject to the provisions of this subchapter or N.J.A.C. 7:14A-25.”

Commenter 22 questions if the basis is the National CSO Control Policy and N.J.A.C. 7:14A-11.12 – Appendix C and, if so, questions the justification for the differences in the overlapping provisions of the draft Tier A MS4 NJPDES permit and the individual NJPDES CSO permits. Commenter 22 further questions why these overlapping provisions in the National CSO Control Policy are applied one way in adding “combined sewer area” requirements to the Tier A MS4 NJPDES permit, and a different way in these individual NJPDES CSO permits. Finally, Commenter 22 questions the justification for imposing “combined sewer area” requirements in the draft Tier A MS4 NJPDES permit that are not imposed on the Hudson County “combined sewer area” municipalities of East Newark Borough, Guttenberg Town, Union City, Weehawken Township, and West New York Town, which do not require a MS4 NJPDES permit because they do not operate a small MS4. [22]

Response 53: While the majority of municipalities in New Jersey are served by a separately sewered system, there are several Tier A municipalities where the municipality owns/operates CSO outfalls and some portions of the municipality are served by a separately sewered system and other portions of that municipality are served by a combined sewer system. Maps that delineate the combined versus separate portion of these communities are available at www.state.nj.us/dep/dwq/cso-sewer-maps.htm and include the following Tier A Municipalities:

Bayonne	Kearny
Camden	Newark
East Newark	North Bergen
Elizabeth	Paterson
Fort Lee	Perth Amboy
Gloucester City	Ridgefield Park
Hackensack	Trenton
Harrison Town	
Jersey City	

The commenter correctly points out that under Attachment A, Contents of the Stormwater Pollution Prevention Plan of the 2009 Tier A MS4 NJPDES permit the permittee could opt to

identify any areas served by a combined sewer system and exclude such from its SPPP by complying with this permit condition:

“a. Tier A Municipalities that want to exclude any “combined sewer area” from the stormwater program must include a map showing the boundaries of the combined sewer area. A “combined sewer area” is an area that is excluded because all stormwater from that area (and operated by the municipality) is discharged to combined (or sanitary) sewer systems.”

However, because maps that delineate combined versus separate areas are now available, there is no longer a need for this map.

The commenter is correct in that the Department did not extend the option for the permittee to exclude certain combined sewer areas from the SPPP. There are many requirements in the Tier A MS4 NJPDES permit that are applied municipality-wide and it does not make sense to apply these requirements to only the separately sewered portion of the municipality. Examples include Local Public Education and Outreach requirements (Part IV.B.2) and Community Wide Ordinances (Part IV.B.5.a). Additionally, there are certain requirements that are contained in both the NJPDES CSO and NJPDES MS4 permits. The Department purposefully ensured that these requirements were similar to ensure that different requirements did not apply in the combined versus separate areas. For example, Part IV.B.5.b.i (Street sweeping) and Part IV.B.5.b.iii (Tier A Municipality Storm Drain Inlet Retrofit) in the Tier A NJPDES MS4 permit are similar to Part IV.F.7.a (Implementation of Pollution Prevention Measures) in the NJPDES CSO permit. In fact, the same retrofitting design standard is included in the NJPDES CSO permit and the NJPDES MS4 permit (which has been applicable to municipal separate storm sewers since 2004) where the design standards for storm drain inlets are included in the attachments to both permits.

The Department maintains that it is within its authority to include within the NJPDES MS4 permit requirements that apply to the entire municipality, which may include combined sewer areas because of the Department’s broad statutory authority to regulate stormwater runoff. Stormwater Management Act, N.J.S.A. 40:55D-93 et seq.; Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Please refer to **Response 195** for more on the Department’s authority. Furthermore, MS4 and CSO drainage boundaries within a municipality are often adjacent and stormwater from one area may flow to the other area and enter the other system—thus it makes sense to include these requirements on a municipality-wide basis in the MS4 permit which ensures the most coverage. Overlapping requirements for street sweeping and catch basin inlets are not a cause for concern, since the requirements are nearly the same, and the Department maintains that conditions applicable to municipal maintenance yards that may be within a combined sewer area are appropriately covered within the NJPDES MS4 permit. This is discussed at length in **Response 50**. The Department also maintains that the requirements of N.J.A.C. 7:8 apply statewide in combined sewer areas.

The NJPDES MS4 permit conditions do not apply to East Newark Borough, Guttenberg Town, Union City, Weehawken Township, and West New York Town as these municipalities are serviced completely by a combined sewer. Specifically, because these municipalities discharge

stormwater under the NJPDES CSO permit to the combined sewer system, the NJPDES MS4 permit does not apply and these comments are outside the scope of this document.

No changes have been made to the final permit as a result of this comment.

54. **Comment:** Commenter 22 states that before the Tier B MS4 NJPDES permit was renewed in 2009, Part I.B.4.a required the RFA for the Tier B permit to include a map showing the boundaries of any “combined sewer area” that a Tier B Municipality wanted to exclude from the Stormwater Program under Part I, Section E. Commenter 22 explains that a “combined sewer area” is an area that is excluded because all stormwater discharges from that area are discharges to combined sewer systems. However, the Department omitted this provision from the 2009 Tier B MS4 NJPDES permit. Commenter 22 states that perhaps this was based on a mistaken belief that no more municipalities with a “combined sewer area” would be assigned to Tier B, or based on a belief that this provision was unnecessary because N.J.A.C. 7:14A-25.8 makes it clear that the Tier B MS4 NJPDES permit regulates discharges from small MS4s only.

Commenter 22 suggests that the Department restore in Part II.B.3.a.ii the pre-2009 “combined sewer area” exclusion provision in the Tier B MS4 NJPDES permit. In addition, Section 7.A.2.d.2 of the Fact Sheet fails to briefly set forth significant legal considerations examined during preparation of the draft permit. Commenter 22 states that the Fact Sheet should include a brief summary of the Department’s legal authority to require control measures that: do not pertain directly to discharges authorized by Part II of the permit; regulate facilities or activities that do not discharge into any stormwater conveyance owned or operated by the Tier B Municipality; and/or regulate, in “combined sewer areas,” stormwater discharges and facilities already regulated under NJPDES CSO permits. [22]

Response 54: This comment concerns a change from the 2004 Tier B MS4 NJPDES permit to the 2009 Tier B MS4 NJPDES permit. The 2009 Tier B MS4 NJPDES permit is not subject to public comment or notice at this time and is outside the scope of this response to comments document. Please refer to **Response 53** regarding the Department’s rationale for not including the option to include a map showing the boundaries of combined sewer areas.

No changes have been made to the final permit as a result of this comment.

55. **Comment:** Commenter 22 states that two existing Tier B MS4 permittees (Ridgefield Park Village and Hoboken City) are mainly in a “combined sewer area.” Using the Tier B MS4 NJPDES permit to require Tier B Municipalities to regulate post construction stormwater discharges and facilities in a “combined sewer area” is unlawful and otherwise inappropriate not only because these discharges and facilities do not contribute to any discharge “authorized” by this permit, but also because these stormwater discharges and facilities are already substantially regulated under NJPDES CSO permits. Commenter 22 notes that the pertinent part of N.J.S.A. 58:10A-6.a states that:

“it shall be unlawful for any person to discharge any pollutant, except ... when the discharge conforms with a valid New Jersey Pollutant Discharge Elimination System permit ...”.

This regulation also establishes that a discharge fully authorized by one NJPDES permit is not subject to another NJPDES permit and that a NJPDES permit is required to include all the terms and conditions that the Department believes are necessary for this discharge to comply with the NJPDES rules and other applicable law. Commenter 22 states that if the NJPDES permit is deficient, the Department's only lawful remedy is to change this NJPDES permit or replace it with another NJPDES permit, not to leave the deficient NJPDES permit unchanged and issue another NJPDES permit with different terms and conditions applicable to the same discharge. Commenter 22 states that such overlap can readily and unnecessarily confuse permittees, the public, Department staff, the courts, and other concerned parties. The individual NJPDES CSO permits that the Department issued to owners and operators of CSO outfalls authorize discharges from CSOs, including stormwater which is an integral part of those discharges as evidenced in the definition of "combined sewer system" at N.J.A.C. 7:14A-1.2.

Commenter 22 states that certain conditions in these individual NJPDES CSO permits require the permittee to control stormwater discharges into the combined sewer system. Part IV.F.7 of NJPDES Permit No. NJ0109118 issued to Ridgely Park Village states:

"The permittee shall continue to implement and upgrade pollution prevention measures necessary to prevent and limit contaminants from entering the entire collection system owned/operated by the permittee that conveys flows to the treatment works. Unless demonstrated to the Department to be impracticable measures, shall include, but not be limited to the following...implementation of stormwater pollution prevention rules and ordinances...and implementation of public education programs."

Commenter 22 notes the Department's March 2015 response to a comment on the draft individual NJPDES CSO permits expressing concern about the unspecified "stormwater pollution prevention rules and ordinances" which is excerpted as follow from the final NJPDES CSO permit:

"Response 200: The Stormwater Management rules (N.J.A.C. 7:8) apply to both combined sewer areas and separate sewer areas. These rules are implemented statewide through the review of permits issued by the Department's Division of Land Use Regulation and are also implemented by local authorities through the Municipal Land Use Law (MLUL) and the Residential Site Improvement Standards (RSIS). As per Article 12, Storm Water Management Plan, in the Municipal Land Use Law, 'Every municipality in the State shall prepare a storm water management plan and a storm water control ordinance or ordinances to implement said plan.' Permittees are responsible for implementing all rules and ordinances adopted in accordance with these statutes through the entire municipality. Therefore, permittees are required to implement stormwater management practices, ordinances and rules to both combined sewer areas as well as separately sewer areas of their municipalities. Substantive changes to these programs are better addressed through the rule making process and public comment process on the MS4 permit renewal or other regulatory avenues.

No changes have been made to the Final permit(s) as a result of this comment."

Commenter 22 contends that there is overlap between these individual NJPDES CSO permits and the draft Tier B MS4 NJPDES permit which is all the more confusing because the overlapping requirements differ in language and substance. Commenter 22 offers the following examples:

- The Part IV.F.7.a.iii requirement (NJPDES Permit No. NJ0109118) for “implementation of stormwater pollution prevention rules and ordinances” with the much more specific “Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment” in Part IV.B.2 of the draft Tier B MS4 NJPDES permit.
- The Part IV.F.7.a.v requirement (NJPDES Permit No. NJ0109118) for “implementation of public education programs” with the much more specific “Minimum Standards for Local Public Education and Outreach” in Part IV.B.1 of the draft Tier B MS4 NJPDES Permit.
- All Part IV.F.7.a. requirements in NJPDES Permit No. NJ0109118 are qualified by the phrase “unless demonstrated to the Department [NJDEP] to be impracticable,” which has no counterpart in related provisions of Part IV.B of the draft Tier B MS4 NJPDES permit.

These individual NJPDES CSO permits do not eliminate this overlap, because they include no provision requiring municipalities to obtain a separate NJPDES permit for stormwater discharges into or conveyed by the CSS regulated by these individual permits. For its part, the draft Tier B MS4 NJPDES permit does not mention these individual NJPDES CSO permits, and is not accompanied by any proposal by the Department to change these individual permits to eliminate this overlap. [22]

Response 55: The Department maintains that Part.IV.B.2 regarding post-construction stormwater runoff in new development and redevelopment applies to both combined and separately sewer portions of the Tier B Municipality and is not limited to discharges to the combined sewer system. The Department was consistent in this approach in the NJPDES CSO permits as evidenced by Response 200 from the NJPDES CSO permit where the Department states "The Stormwater Management Rules (N.J.A.C. 7:8) apply to both combined and separate areas. These rules are implemented statewide...". The Department does not agree with the commenter's assertion that the Department incorporated this condition because the NJPDES CSO permits were deficient in any manner.

Regarding the commenter's concern regarding any overlap between the NJPDES CSO and Tier B MS4 NJPDES permits, note that the Tier B MS4 NJPDES permit only includes two of the SBRs namely local public education and outreach (Part IV.B.1) and post-construction (Part IV.B.2). Post construction is addressed above and is applied municipality-wide. However, regarding public education as applicable to a municipality that is comprised of both combined sewers and separate sewer systems, it would be impractical and confusing to mandate that the requirements of Attachment B apply only to the separately sewer portion of the

municipality. For example, if the Tier B Municipality were to conduct a rain barrel workshop (which is an allowable activity under Attachment B) it would be inappropriate and difficult to condition participation to only those residents that live in the separately sewered area. In fact, implementation of the public education requirements would provide benefits to both the combined and separate sewered portions of the Tier B Municipality.

No changes have been made to the final permit as a result of this comment.

56. **Comment:** Commenter 22 questions the issue of regulatory basis for “combined sewer areas” in the Tier B MS4 NJPDES permit as described in **Comment 53** for the Tier A MS4 NJPDES permit. Commenter 22 also questions the justification for imposing “combined sewer area” requirements in the draft Tier B MS4 NJPDES permit that are not imposed on the Hudson County “combined sewer area” municipalities of East Newark Borough, Guttenberg Town, Union City, Weehawken Township, and West New York Town, which do not now require a MS4 NJPDES permit because they do not now operate a small MS4. Moreover, in the Department’s March 2015 response to comments on the draft individual NJPDES CSO permits expressing concern about which entities require a CSO permit, the Department states the following in the final NJPDES CSO permit:

“Response 45-47: Federal and state CSO regulations limit the issuance of CSO permits to CSO owners and their STPs [sewage treatment plants]. See the National CSO Policy, 59 Fed. Reg. at 18695; N.J.A.C. 7:14A-11 (Appendix C) ...”

Commenter 22 states that by adding “combined sewer area” requirements to the Tier B MS4 NJPDES permit, the draft Tier B MS4 NJPDES permit is in effect a partial CSO permit for Hoboken City, a Tier B MS4 permittee that has a “combined sewer area” but does not own operate CSO outfalls or STPs that accept and treat flows from CSS municipalities. [22]

Response 56: While the majority of municipalities in New Jersey are served by a separately sewered system, there are two Tier B municipalities (Ridgefield Park Village and Hoboken) where the municipality owns/operates CSO outfalls and some portions of the municipality are served by a separately sewered system and other portions of that municipality are served by a combined sewer system. Maps that delineate the combined versus separate portion of Ridgefield Park Village and Hoboken are available at www.state.nj.us/dep/dwq/cso-sewer-maps.htm. The Department maintains that it is within its jurisdictional authority to include combined sewer areas within the NJPDES MS4 permit as it relates to Part IV.B.2. This is discussed at length in **Response 55**.

As described in **Response 53**, the NJPDES MS4 permit conditions do not apply to East Newark Borough, Guttenberg Town, Union City, Weehawken Township, and West New York Town as these municipalities are serviced completely by a combined sewer. Specifically, because these municipalities discharge stormwater under the NJPDES CSO permit to the combined sewer system, the NJPDES MS4 permit does not apply and these comments are outside the scope of this document.

No changes have been made to the final permit as a result of this comment.

57. **Comment:** Regarding Part II.A.2, Commenter 22 notes that the Department’s FAQ document for the draft permit includes the following statement:

“12. Does the Tier A MS4 NJPDES permit regulate privately owned streets, basins, and storm drains?”

Yes. Stormwater facilities owned by commercial interests or by homeowners associations, for example, are subject to local stormwater codes, ordinances, and enforcement. Stormwater facilities that are properly maintained are an important component in addressing water quality and flooding issues. Municipalities are responsible for ensuring that the owners perform proper operation and maintenance. An exception would be a stormwater system that is regulated directly under another stormwater discharge permit other than the Tier A MS4 NJPDES permit.”

Commenter 22 contends that this statement makes no distinction between privately owned stormwater facilities that discharge into the MS4 (or MMY or CSS) owned or operated by the Tier A Municipality, and privately owned stormwater facilities that do not discharge into this MS4 (or MMY or CSS). Commenter 22 continues by saying that this is unlawful as this extension conflicts with the policy that control measures in a NJPDES permit pertain directly to the discharge(s) of pollutants authorized by the permit, or to the facility(ies) contributing to the authorized discharge(s). Note in this regard that under the Water Pollution Control Act at N.J.S.A. 58:10A-6.f(3) NJPDES permits must require the permittee:

“to insure that all discharges are consistent at all times with the terms and conditions of the permit and that no pollutant will be discharged more frequently than authorized or at a level in excess of that which is authorized by the permit.”

The only discharges that Part II.A.2 of the draft permit “authorize” are (i) certain stormwater and non-stormwater discharges from small MS4s; and (ii) certain stormwater discharges from municipal maintenance yards and other ancillary operations (MMY). The draft permit does not “authorize” any discharges conveyed solely on property not owned or operated by the Tier A Municipality, or any non-MMY discharges from or into CSSs. It is inherently confusing and unreasonable for the Tier A “MS4” NJPDES permit to require Tier A Municipalities to control non-MS4, non-MMY discharges that the permit does not even purport to “authorize.”

As a description of the primary “authorized” discharges, the name “Tier A MS4 NJPDES Permit” is reasonable. As a description of what the permit requires Tier A Municipalities to regulate, this name is misleading. [22]

Response 57: As questioned in this comment and as described in the FAQ, the MS4 NJPDES permit regulates privately owned streets, basins, and storm drains which includes privately owned stormwater facilities that discharge into the MS4 as well as those privately owned stormwater facilities that do not discharge into the MS4 but end up discharging to state waters.

This is described in **Response 25** as well as in the FAQ. As described in **Response 50** and **Response 52**, the Tier A MS4 NJPDES permit also covers discharges from the MMY that do not discharge into the MS4 system. Please refer to **Response 53** regarding combined sewer systems.

Stormwater runoff from developments, regardless of whether it discharges directly into a MS4 or surface waters, may contain pollutants that need to be regulated. As required by Part IV.B.4.a of the Tier A MS4 NJPDES permit, the Tier A Municipality shall develop, update, implement and enforce its stormwater management program to address post construction stormwater runoff in new development and redevelopment and to ensure compliance with the Stormwater Management rules at N.J.A.C. 7:8 et seq. The N.J.A.C. 7:8 rules were adopted under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Stormwater Management Act, N.J.S.A. 40:55D-93 et seq., among other statutes, and regulate stormwater runoff discharges from developments approved by municipalities. The municipality is responsible under N.J.A.C. 7:8 for ensuring proper operation and maintenance of stormwater controls and designs according to municipal ordinances and the municipal stormwater plan. The permit incorporates the requirements of N.J.A.C. 7:8 which the municipality is already responsible for implementing. The Tier A MS4 NJPDES permit is applicable to all stormwater facilities approved by the municipality under its stormwater program that is not otherwise covered by a NJPDES permit. It is important that a municipality ensures the operation and maintenance of municipal stormwater requirements authorized and overseen by the municipality for all development or redevelopment. The statutes directing the Department to require municipalities to oversee these matters, did so in order to protect water quality from stormwater runoff.

Therefore, considering that privately owned and operated stormwater facilities that discharge directly into waterbodies can contribute additional sources of stormwater pollutants, the Department can lawfully regulate them under the MS4 NJPDES permits. The comment seems to misinterpret the inclusion of privately owned and operated stormwater facilities that discharge directly to state waters in the Tier A MS4 NJPDES permit as an authorization of unlawful discharge to the surface water without any regulation. However, in contrast to the comment, Part IV.B.4 of the Tier A MS4 NJPDES permit establishes a regulatory mechanism under which the Department can legally regulate those stormwater facilities that directly discharge to waters within municipality's boundaries as allowed under the municipality's stormwater control ordinance.

In summary, under the broad language found in the Water Pollution Control Act, the Stormwater Management Act, and general Department authority such as N.J.S.A. 13:1D-9, the legislative intent grants the Department "ample power to deal comprehensively in a single set of regulations" In re Stormwater Mgmt. Rules, 384 N.J. Super. 451, 461-62 (Super. Ct. App. Div. 2006) (citing Soc'y for Env'tl. Econ. Dev. v. N.J. Dep't of Env'tl. Prot., 208 N.J. Super. 1, 8 (App.Div.1985)). By including direct stormwater discharges to state waters from residential and nonindustrial nonresidential development, the Tier A and Tier B MS4 NJPDES permits "promote or advance the policies and findings that served as the driving force for the enactment of the legislation." A.A. Mastrangelo, Inc. v. Comm'r of Dep't of Env'tl. Prot., 90 N.J. 666, 684, (1982). Please refer to **Response 190-194** for additional information regarding this topic.

No changes have been made to the final permit as a result of this comment.

58. **Comment:** Commenter 22 includes a similar comment regarding the FAQ and Part II.A.2 of the Tier B MS4 NJPDES permit. However, Commenter 22 states that the comment on the Tier B MS4 NJPDES permit is specific to the unlawfully large geographic scope covered in that permit and does not pertain to the Municipal Maintenance Yard and other ancillary operations as required in the Tier A MS4 NJPDES permit. [22]

Response 58: Please refer to **Response 57.**

59. **Comment:** Commenter 16 questions how “industrial” is defined in Part II.A.2.b.iii and questions if this condition includes discharges of refrigerant condensate from supermarkets. Commenter 16 states that this provision does not appear to be consistent with the 2015 National Standard Plumbing Code, which requires most types of condensate to be discharged to the sanitary sewer system. [16]

Response 59: Part II.A.2.b.iii (renumbered as Part II.C.2.b.iii) concerns eligible non-stormwater discharges that are authorized discharges under the Tier A and Tier B MS4 NJPDES permit. As stated in the Fact Sheets for the Tier A and Tier B draft permits, the permits continue to authorize certain non-stormwater discharges from small MS4s owned or operated by municipalities. “Air conditioning condensate (excluding contact and non-contact cooling water; and industrial refrigerant condensate)” is considered an eligible non-stormwater discharge. Under the expired 2009 Tier A and Tier B MS4 NJPDES permits, discharges of air conditioning condensate were eligible non-stormwater discharges, but discharges of contact and non-contact cooling water were excluded.

The Tier A and Tier B MS4 NJPDES renewal permits specifically exclude discharges of industrial refrigerant condensate to clarify that only condensate from air conditioning designed to cool building air for occupancy purposes is an eligible discharge. Discharges of industrial refrigerant condensate have been specifically excluded since industrial refrigeration units run more continuously and generate condensate of higher quantity than that generated during the cooling of air for building occupancy purposes. Examples of industrial applications would be refrigeration units used at cold storage warehouses and manufacturing facilities which are now considered ineligible non-stormwater discharges under this permit. A complete list of eligible non-stormwater discharges is included in Part II.A.2.b of the Tier A and Tier B MS4 NJPDES renewal permits.

Any issues in relation to the National Standard Plumbing Code are outside the scope of this permit. Additionally the issuance of this permit shall not be considered as a waiver of any applicable federal, state or local rules, regulations and ordinances.

No changes have been made to the final permits as a result of this comment.

60. **Comment:** Part II.A.2.b.viii authorizes flows from “firefighting activities including the washing of fire fighting vehicles.” Commenter 18 states that washing of fire fighting vehicles is not considered “firefighting activities” and that the NPDES regulations also only authorize water from residential car washings. See 40 CFR 122.34(b)(3)(ii). Commenter 18 requests the removal of the language that permits the “washing of fire fighting vehicles.” [18]

Response 60: As noted in this comment regarding Part II.A.2.b.viii (renumbered as Part II.C.2.b.viii), 40 CFR 122.26(b)(2) exempts “discharges resulting from firefighting activities” from the definition of an illicit connection yet the term “firefighting activities” is not defined in the federal rules. The Department has determined that washing of firefighting vehicles is a necessary measure undertaken to ensure their proper operation, and thus fits into the category of “firefighting activities.” The Department does not consider the washing of firefighting activities to be a significant source of pollutants to MS4 discharges; therefore, they are not required to be addressed in accordance with 40 CFR 122.34(b)(3)(ii).

The general requirements at 40 CFR 122.34(a) require that “the permitting authority must include permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable” and the illicit connection program requirements at 40 CFR 122.34 (b)(3)(i) “require the development, implementation, and enforcement of a program to detect and eliminate illicit discharges.” It is neither practicable nor enforceable to require that all firefighting vehicles be washed at commercial washing facilities due to their size and dimensions; the fact that many firefighting companies in New Jersey are volunteer operations; and the limited availability of commercial truck-washing facilities throughout the state. The Department will address this issue and make recommendations on further minimizing the discharge of pollutants from the washing of firefighting vehicles in the Tier A and Tier B Municipal Stormwater Guidance Documents.

No changes have been made to the final permits as a result of this comment.

61. **Comment:** Commenter 22 contends that the “except” clause in Part II.A.3.a.i is vague and confusing because the draft permit does not “specifically” authorize “stormwater discharge associated with industrial activity” which is a term that is not used in Part II.A.2.a, “Eligible Stormwater Discharges.” Because “Stormwater discharges associated with industrial activity” is addressed insufficiently in the draft Tier A MS4 NJPDES permit text and Fact Sheet, Commenter 22 suggests that the “except as otherwise specifically provided in this permit” clause be deleted from Part II.A.3.a.i, unless the Department prepares for public comment a new draft Tier A MS4 NJPDES permit and appropriately modified Fact Sheet (see N.J.A.C. 7:14A-15.14).

Part II.A.2.a authorizes only two kinds of stormwater discharges. The first is stormwater discharges from small MS4s (Part II.A.2.a.i). Although many such discharges include “stormwater discharge associated with industrial activity,” it is the operating entity(ies) for the industrial plant, not the Tier A Municipality, that must obtain NJPDES permit authorization for the “stormwater discharge associated with industrial activity” (unless the Tier A Municipality also operates the industrial plant). Commenter 22 states that it is unthinkable to suppose that “except as otherwise specifically provided in this permit” is referring to Part II.A.2.a.i.

Commenter 22 continues by stating that it is more likely that “except as otherwise specifically provided in this permit” is referring to Part II.A.2.a.ii, which authorizes stormwater discharges from MMY. Commenter 22 notes that some MMY stormwater discharges are “stormwater discharge associated with industrial activity.” Commenter 22 suggests that to make the important link to MMY explicit, Commenter 22 suggests that Part II.A.3.a.i be revised to state “except if such discharge is from municipal maintenance yards or other ancillary operations, and is authorized by Part II.A.2.a.” [22]

Response 61: As noted previously Part II.A.2.a.i (renumbered as Part II.C.2.a.i) indicates that eligible stormwater discharges include “Small MS4s (as defined at N.J.A.C. 7:14A-1.2) owned or operated by Tier A Municipalities” and Part II.A.2.a.ii (renumbered as Part II.C.2.a.ii) indicates that eligible stormwater discharges include “Municipal Maintenance yards and other ancillary operations...owned or operated by Tier A Municipalities.” Part II.A.3.a.i (renumbered as Part II.C.3.a.i) is stated as follows:

“3. Discharges Not Authorized Under the Tier A MS4 NJPDES Permit

a. Stormwater Discharges Associated with Industrial Activity

- i. The Tier A MS4 NJPDES Permit does not authorize “stormwater discharge associated with industrial activity” as defined in N.J.A.C. 7:14A-1.2 except as otherwise specifically provided in this permit.”

The Department maintains that it would unnecessarily complicate Part II.A.3.i by adding “except if such discharge is from municipal maintenance yards or other ancillary operations, and is authorized by Part II.A.2.a” as suggested in this comment. Part II.A.2.a is clear as written as to what discharges are authorized under the permit. It is unnecessary to reiterate this in Part II.A.3.a.i.

Please refer to **Response 42** regarding the Department’s response to the commenter’s assertion that the Fact Sheet is insufficient.

No changes have been made to the final permits as a result of this comment.

62. **Comment:** Part II.A.3 concerns “Discharges Not Authorized Under the Tier A MS4 NJPDES Permit.” Commenter 33 suggests that the Department add a new section “v” to include new recycling activities for handling construction debris/materials so that it is included within the definition of “Stormwater Discharges Associated with Industrial Activity.” [33]

Response 62: The Department disagrees with this suggested change. Pursuant to Part II.A.3.a.i (renumbered as Part II.C.3.a.i), “The Tier A MS4 NJPDES Permit does not authorize “stormwater discharge associated with industrial activity” as defined in N.J.A.C. 7:14A-1.2 except as otherwise specifically provided in this permit.” Since the definition of “stormwater discharge associated with industrial activity” at N.J.A.C. 7:14A-1.2 includes facilities involved in

the recycling of materials, the Tier A MS4 NJPDES permit does not authorize stormwater discharge from such activities. One exception is that the Tier A MS4 NJPDES permit authorizes stormwater discharges associated with certain activities occurring at municipal maintenance yards if the Best Management Practices found in Attachment E of the permit are met (see Part IV.B.5.c of the Tier A MS4 NJPDES permit). The Department chooses to rely on the definition of “stormwater discharge associated with industrial activity” to exclude permit coverage to the broad range of activities covered by that definition rather than attempt to itemize all excluded activities in the permit. The approach also ensures that the permit remains consistent with any future modifications to the NJPDES regulations at N.J.A.C. 7:14A-1.2.

No changes have been made to the final permits as a result of this comment.

63. **Comment:** Part II.A.3 concerns “Discharges Not Authorized Under the Tier A MS4 NJPDES Permit” where Part II.A.3.b concerns “Stormwater Discharges Associated with Construction Activity.” Commenter 33 suggests that Part II.A.3.b.i be changed so that the limitation of construction activity is reduced to 1/4 acre. Commenter 33 states that the condition as written infers that construction activity up to an acre is authorized by this permit. If this change is made, any cross references may require changes (i.e., Soil Restoration Standards). Similarly, Commenter 33 suggests that Part II.A.3.b.ii be changed to add language for “or stone construction debris and similar materials” with such discharge. [33]

Response 63: Part II.A.3.b.i and ii (renumbered as Part II.C.3.b.i and ii) is stated as follows:

- “i. The Tier A MS4 NJPDES Permit does not authorize “stormwater discharges associated with construction activity” as described in N.J.A.C. 7:14A-24.10(a). In general, this is the discharge to surface water of stormwater from construction activity that disturbs at least one acre.
- ii. Any municipality that operates a construction site with such a discharge shall submit a separate RFA under NJPDES Permit No. NJ0088323 (General Stormwater Permit Construction Activity, see www.nj.gov/dep/dwq/5g3.htm), or an application for an individual permit for that discharge. An RFA submitted for the Tier A MS4 NJPDES Permit does not qualify as an RFA for such a discharge. See Part IV.B.3 of the Tier A MS4 NJPDES Permit.”

The Department disagrees with the suggested change in this comment. The purpose of the above referenced permit conditions (and related Part IV.B.3) is to clarify that there are separate permit application requirements for the Tier A MS4 NJPDES permit versus the activities typically covered under the Construction Activity NJPDES Permit No. NJ0088323. The proposed language as included in this comment is inconsistent with that purpose. If a municipality is performing construction activity, the regulatory threshold is one acre, or less than one acre but part of a larger common plan of development that is greater than one acre. There is no regulatory basis at this time to impose a regulatory trigger of 1/4 acre for construction activity as suggested in this comment.

Similarly, the Department does not agree that it is appropriate to add the language “or stone construction debris and similar materials.” The General Stormwater Permit Construction Activity is a separate regulatory document which specifies requirements applicable to that permit. Any changes would need to be made as part of that permit process.

No changes have been made to the final permits as a result of this comment.

64. **Comment:** Commenter 11 states that the responsibilities of the Municipal Stormwater Program Coordinator in Part II.B.2.b are incomplete and vague. Specific requirements/credentials should be outlined to assume this role. [11]

Response 64: While there is a reference to the Municipal Stormwater Program Coordinator in Part II.B.2.b (renumbered as Part II.D.2.b) as stated in this comment, the responsibilities of the Municipal Stormwater Program Coordinator (Stormwater Coordinator) are specifically delineated in the Tier A MS4 NJPDES permit at Part IV.F.2 and 3, and in the Tier B MS4 NJPDES permit at Part IV.E.1 and 2.

No changes have been made to the final permits as a result of this comment.

65. **Comment:** Part II.B.3 concerns Requests for Authorization where Part II.B.3.a is entitled “New RFA’s under the Tier A MS4 permit.” Commenter 33 suggests that Part II.B.3.a.ii be changed to add the words “except as described in II.A.3.b.ii.” [33]

Response 65: The Department disagrees with this comment. Part II.B.3.a (renumbered as Part II.D.3.a) is titled “New RFAs under the Tier A MS4 permit” and refers to the application requirements for the Tier A MS4 NJPDES permit, only. RFA stands for Request for Authorization which is the form of application required by the Department for entities seeking authorization under a general permit. Regarding “New RFAs under the Tier A MS4 permit” in Part II.B.3.a.ii (renumbered as Part II.D.3.a.ii), this permit condition is stated as follows:

“ii. An RFA shall include at a minimum: the name and address of the municipality; the name and address of the Municipal Stormwater Program Coordinator; a certification acknowledging the best management practices and measurable goals specified in the permit; and any other information as required by the Department.”

The purpose of Part II.B.3.a.ii (renumbered as Part II.D.3.a.ii) is to state the minimum contents of the RFA for the Tier A MS4 NJPDES permit and is independent of Part II.A.3.b.ii (renumbered as Part II.C.3.b.ii) which is related to construction activity typically covered under NJPDES Permit No. NJ0088323 (Construction Activity Permit, also referred to as the 5G3 permit). There are separate and distinct application requirements for the Construction Activity Permit at www.nj.gov/dep/dwq/5g3.htm. The suggested language would be inconsistent with the purpose of this section.

No changes have been made to the final permit as a result of this comment.

66. **Comment:** Commenter 18 notes that Part II.B.3.a.ii of the draft permit excludes the requirement to identify receiving streams/waterbodies as part of the outfall pipe map. Commenter 18 requests that Tier A Municipalities be required to submit an updated RFA that includes this information. This is consistent with page 36 of the Fact Sheet where the Department states “Consistent with the requirements of 40 CFR 122.33(b)(1) and 40 CFR 122.28(b)2, the Department is also requiring the submission of the outfall pipe map including the location and names of the receiving waterbodies.” Commenter 18 notes that 40 CFR 122.28(b)(2)(ii) requires that the contents of a notice of intent to be covered by a general permit include the receiving streams. Pursuant to Part IV.B.6.iv., all Tier A Municipalities covered under this permit will identify and submit to the Department, all receiving streams/waterbodies within 36 months of the effective date of the permit.

In summary, Commenter 18 expects the Department to require Tier A Municipalities to identify all receiving streams/waterbodies as part of the submission of an updated RFA. [18]

Response 66: The Department disagrees with this comment. The commenter states that “all” permittees have 36 months to submit outfall pipe maps. Regarding outfall pipe mapping, Part IV.B.6.a (Minimum Standards for MS4 Outfall Pipe Mapping, and Illicit Discharge and Scouring Detection and Control), the following is stated:

“a. Outfall Pipe Mapping: Tier A Municipalities shall develop, update and maintain an outfall pipe map showing the location of the end of all MS4 outfall pipes (tidal and non-tidal) owned or operated by the Tier A Municipality which discharge to a surface water body. The outfall pipe map shall:

- i. Be current at the end of each calendar year;
- ii. Show the location (and name, where known to the municipality) of all surface water bodies receiving discharges from those outfall pipes;”

The Tier A MS4 NJPDES permit allows 36 months to submit outfall pipe maps only for “new permittees.” Existing permittees will be required to submit their outfall pipe maps within 12 months of the effective date of the permit. Tier A Municipalities have already created outfall pipe maps showing the location and names of all surface water bodies receiving discharges from outfall pipes beginning with Part I.6.a.i of the 2004 Tier A MS4 NJPDES permit. The Department is advancing this requirement by requiring existing Tier A Municipalities submit their outfall pipe map, including the location and names of all surface water bodies, to the Department within 12 months from EDPA and update the outfall pipe map annually as part of the Annual Report and Certification process (Part IV.B.6.a). The Department maintains that this is a sufficient amount of time to submit the outfall pipe maps and associated surface water information without putting undue strain on the existing Tier A Municipalities and while conforming to the rules in N.J.A.C. 7-14A and 40 CFR 122.34.

No changes have been made to the final permit as a result of this comment.

67. **Comment:** Regarding the Tier B MS4 NJPDES permit, Commenter 18 states that 40 CFR 122.34 requires all six minimum control measures unless a waiver is granted. Commenter 18 believes there is no waiver in New Jersey and that the Department covers Tier B municipalities without four of the six minimum control measures. All six minimum control measures should be included in the Tier B MS4 NJPDES permit. [18]

Response 67: The Department disagrees with this comment. As stated in the 2004 N.J.A.C. 7:14A Subchapter 25 rule adoption Response to Comments 93-96 (36 N.J.R. 827-828): “By obtaining the Tier B Permit, these 71 Tier B Municipalities avoid designation under 40 CFR 123.35(b).” Municipalities that are assigned to Tier B either have received a waiver under N.J.A.C. 7:14A-25.2(d), or they are not eligible for the Tier A MS4 NJPDES permit under N.J.A.C. 7:14A-25.3(a)1. Those municipalities that have received a waiver and are designated as Tier B municipalities are listed in N.J.A.C. 7:14A-25.2(d)4. Tier B Municipalities tend to be located in more rural and non-coastal areas.

No changes have been made to the final permit as a result of this comment.

68. **Comment:** Part II.C.2.a concerns “Discharge of Pollutants” under “General Conditions.” Commenter 33 suggests that the wording be changed to:

“The Tier A Municipality SHALL satisfy the requirements of N.J.A.C. 7:14A-6.2(a)2. If there is a discharge of a pollutant in the municipal system, the municipality should have to prove it was not as a result of permit activities.” [33]

Response 68: Part II.C.2.a (renumbered as Part II.B.2.a) is stated as follows:

“a. For discharges authorized by this permit, the Tier A Municipality is exempt from N.J.A.C. 7:14A-6.2(a)2. This exemption means that the discharge of any pollutant not specifically regulated in this NJPDES permit or listed and quantified in the RFA shall not constitute a violation of the permit.”

The Department disagrees with this suggested change to permit language. This permit condition was carried forward from the 2009 Tier A MS4 NJPDES permit and is not a new exemption. The Tier A MS4 NJPDES permit does not regulate specific pollutants nor does it require end-of-pipe monitoring. The Tier A MS4 NJPDES permit protects water quality by implementing best management practices (BMPs) instead of monitoring for and treating specific pollutants, which makes compliance with N.J.A.C. 7:14A-6.2(a)2 impracticable.

No changes have been made to the final permits as a result of this comment.

69. **Comment:** Regarding Part II.C.4.c, Commenter 18 suggests the replacement of the phrase “...regulations concerning threatened and endangered species...” with “...regulations concerning threatened and endangered species and their designated critical habitat...” as consistent with 40 CFR Part 122.49(c). Commenter 18 notes that as per 40 CFR Part 123.25 (Requirements for permitting), the Department is not required to implement 40 CFR Part 122.49. [18]

Response 69: The Department agrees that the intent of this section is to appropriately reference other regulatory requirements and that consistency with 40 CFR 122.49(d) is appropriate. As a result, Part II.C.4.c (renumbered as Part II.B.4.c) is modified as follows:

“c. In accordance with N.J.A.C. 7:14A-6.2(a)7, this permit does not authorize any infringement of State or local law or regulations, including, but not limited to, N.J.A.C. 7:50 (the Pinelands rules), N.J.A.C. 7:1-E (Discharges of Petroleum and other Hazardous Substances), regulations concerning threatened and endangered species and their designated critical habitat, and other Department rules. No discharge of hazardous substances (as defined in N.J.A.C. 7:1E-1.6) resulting from an onsite spill shall be deemed to be “pursuant to and in compliance with this permit” within the meaning of the Spill Compensation and Control Act at N.J.S.A. 58:10-23.11c.”

This change affects Part II.B.4. c of the final Tier A and Tier B MS4 NJPDES permits.

70. **Comment:** Part II.C.4.d concerns “Other Regulatory Requirements” under “General Conditions.” Commenter 33 suggests that the wording regarding “exempt” be eliminated. Commenter 33 questions if an operations and maintenance manual was required under the stormwater rules/regulations for the past number of years and that any exemption should only apply to facilities older than applicable requirements. Commenter 33 states that in many cases operations and maintenance manuals make specific recommendation/requirements regarding the schedule, frequency of cleaning, maintaining and operating which a municipality should follow; therefore, exempting this requirement does not seem reasonable. [33]

Response 70: Part II.C.4.d (renumbered as Part II.B.4.d) is stated as follows:

“d. While the Tier A Municipality is required to comply with applicable operation and maintenance requirements of N.J.A.C. 7:14A-6.12(a), the Tier A Municipality is exempt from the operations and maintenance manual requirements of N.J.A.C. 7:14A-6.12(c). This exemption applies only to discharges authorized under this permit and does not alter the operation and maintenance requirements for municipally or privately owned stormwater facilities specified in this permit or N.J.A.C. 7:8.”

It appears that the commenter is mistaking a “maintenance plan” with an “operation and maintenance manual.” The Tier A MS4 NJPDES permit includes multiple references and requirements related to a “maintenance plan” as defined in the Tier A MS4 NJPDES permit and as described in N.J.A.C. 7:8. As discussed on page 55 of the draft Tier A MS4 NJPDES permit Fact Sheet:

“In order to guide operations and maintenance of a designed system, a maintenance plan is developed for stormwater facilities. A maintenance plan is defined in this draft Tier A MS4 NJPDES permit in the Notes and Definitions section as follows:

“Maintenance plan” means a maintenance plan pursuant to N.J.A.C. 7:8-5.2(b) and 5.8 prepared by the design engineer for the stormwater management measures incorporated into the design of a major development.

Note that a maintenance plan is not an operation and maintenance manual as described in the NJPDES rules at N.J.A.C. 7:14A-6.12. While the Tier A Municipality is required to comply with applicable operation and maintenance requirements of N.J.A.C. 7:14A-6.12(a), the Tier A Municipality is exempt from the operations and maintenance manual requirements of N.J.A.C. 7:14A-6.12(c). See Part II.C.4.d of this draft Tier A MS4 NJPDES Permit.”

The exemption provided at Part II.C.4.d (renumbered as Part II.B.4.d) of the Tier A MS4 NJPDES permit renewal was also provided at Part I.J.3.a of the 2009 Tier A MS4 NJPDES permit which stated, “In accordance with N.J.A.C. 7:14A-6.12(c), for a discharge authorized by this permit, the Tier A Municipality is exempt from the requirement to prepare an operations and maintenance manual.” The Tier A MS4 NJPDES permit renewal also specifically requires the municipality to develop, update, and implement a program to ensure adequate long-term cleaning, operation, and maintenance of stormwater facilities (see Part IV.C.1). Similar requirements are included in the Tier B MS4 NJPDES permit.

No changes have been made to the final permits as a result of this comment.

Part III: Recordkeeping and Reporting

Tier A and Tier B MS4 NJPDES Permits, Attachment A for Existing Permittees and Attachment A-1 for New Permittees (Tier A and Tier B MS4 NJPDES Permits)

71. **Comment:** Part III sets forth a recordkeeping requirement. Commenter 18 suggests that the Department include a detailed list of records to be kept, a designation of where the record should be kept and that the Department establish a period of time for record retention. The period of retention should be no less than the three years as required by 40 CFR 122.34(g)(2). [18]

Response 71: The Department agrees that recordkeeping requirements are appropriate. While such permit requirements are not specifically included in Part III, these requirements are described in other sections of the Tier A MS4 NJPDES permit at Part IV.F.1.a.iv, Part IV.F.1.d, Part IV.G.1.e, Attachment A for Existing Permittees and Attachment A-1 for New Permittees. The SPPP described in Part IV.F.1, as stated on page 61 of the Tier A MS4 Permit Fact Sheet:

“...provides a place for record keeping to document when and how permit requirements were met.” Also, Part IV.G.1.e states that the Tier A Municipality shall “retain the Annual Report and Certification as well as any records required to be kept by this permit for a period of at least five years.”

No changes have been made to the final permits as a result of this comment.

72. **Comment:** Commenter 22 expresses support regarding the inclusion of Attachment A-1 in the draft Tier A and Tier B MS4 NJPDES permits. This separate implementation schedule, which applies to Tier B Municipalities that become Tier A Municipalities, was missing from the previously issued preliminary draft permit. [22]

Response 72: The Department acknowledges the support for Attachment A-1 (Measurable Goals and Implementation Schedule for New Permittees) and agrees that this change serves to clarify permit requirements for newly designated Tier B Municipalities.

73. **Comment:** Commenter 15 states that the summary of “measurable goals” that the Department has included in Attachments A and A-1 to the draft Tier A MS4 NJPDES permit does not ensure that MS4s will meet the maximum extent practicable, as those goals are not actually measurable in many cases. For example, the “measurable goal” for the various community ordinances is described simply as certification in the annual report that such an ordinance has been adopted and is being enforced; but the permit establishes no specific or measurable standards for the contents of those ordinances, nor does it set a deadline for MS4s to adopt such ordinances if they have not already done so. Permittees should be required to enact ordinances within six months of the effective dates of the permit. Along the same lines, the “measurable goal” for stormwater facilities maintenance is to certify that facilities are functioning and maintain a log sufficient to demonstrate compliance; but no measurable performance standards apply to this requirement. Essentially, the “measurable goals” in Attachments A and A-1 simply reiterate the requirements contained within the body of the permit itself and do not add a measurable component to requirements where the permit does not already include one. [15]

Response 73: The Department disagrees with the comment. Attachments A and A-1 include the specific measurable goals that the Department will use to determine compliance with the Tier A MS4 NJPDES permit and also include enforceable deadlines for implementing the requirements. Attachments A and A-1 provide a simple user friendly way to ensure that municipalities and the Department’s compliance officers can easily identify the requirements of the permit.

Regarding the example of ordinance adoption as raised in this comment, Part IV.B.5.a of the Tier A MS4 NJPDES permit describes the requirements of each Community Wide Ordinance and directs permittees to the Tier A Municipal Guidance Document for sample ordinances. All existing permittees were required to adopt these ordinances under the 2009 Tier A MS4 NJPDES permit. Therefore, compliance with this requirement should have already occurred and, if not, the Department’s enforcement program would have cited the municipality for failure to adopt such under the 2009 Tier A MS4 NJPDES permit. The implementation schedule in this subject renewal permit and Attachment A continues to require that ordinances be adopted and enforced as of the effective date of permit authorization (EDPA). Any newly designated Tier A Municipalities will have twelve (12) months from EDPA to adopt and begin enforcing the Community Wide Ordinances.

With regard to stormwater facility maintenance, the Department has clarified the requirement to include that stormwater facility maintenance must be performed pursuant to any maintenance

plans or more frequently as needed to ensure proper function and operation of the stormwater facility and that maintenance logs must be kept to demonstrate compliance with the maintenance requirements. The implementation schedule for this requirement is twelve (12) months from EDPA for existing Tier A permittees and eighteen (18) months from EDPA for new Tier A permittees. Additional information regarding these requirements is included in **Response 187-188**.

No changes have been made to the final permits as a result of this comment.

Part IV: Specific Requirements: Narrative, Notes and Definitions

Tier A and Tier B MS4 NJPDES Permits

74. **Comment:** Commenter 26 requests the elimination of untreated plowed snow disposal into local waters. [26]

Response 74: While the Department’s Snow Removal and Disposal Policy is referenced within the Notes and Definitions sections as a Department Resource for Guidance Relating to MS4 Issues (Part IV.A.3.d), the disposal of untreated plowed snow is not the subject of the Tier A or Tier B MS4 NJPDES permits. However, salt and de-icing material storage and handling requirements are found in Part IV.B.5.c.v and Attachment E of the Tier A MS4 NJPDES permit.

As referenced in the Notes and Definitions section, the Department established a “Snow Removal and Disposal Policy” and posted that policy at www.state.nj.us/dep/dwq/pdf/snow_removal.pdf. Entities which seek to dispose of snow during emergency conditions must first adhere to the snow removal policy by creating an emergency snow disposal area(s). Under extraordinary conditions, after all land-based areas of disposal are exhausted, disposal of snow that is not obviously contaminated with road salt, sand, and other pollutants may be allowed in certain water bodies under certain conditions. In these cases, municipalities and counties are required to request the Department’s authorization for the event by calling the DEP Hotline at 1-877-WARN-DEP. Site selection guidelines in these emergency situations are also listed in the “Snow Removal and Disposal Policy.”

No changes have been made to the final permits as a result of this comment.

75. **Comment:** Regarding the Notes and Definitions section in Part IV.B.1, Commenter 18 recommends including definitions for “Municipal Stormwater Management Plan” (MSWMP), “Stormwater Pollution Prevention Plan” (SPPP), “pollutant,” “outfall,” “measurable goal,” “surface water body” and “waters of the State.” [18]

Response 75: There is a cross reference within Part IV.B.1.a of this section to definitions within the NJPDES Regulations at N.J.A.C. 7:14A where “pollutant,” “outfall,” “surface water,” and “waters of the State” are defined. Because these terms are already defined within regulations, a cross reference is appropriate to ensure that the permits are current in the event of any regulatory changes. Regarding “Municipal Stormwater Management Plan” (MSWMP) and “Stormwater

Pollution Prevention Plan” (SPPP), there are extensive descriptions for these documents within Part IV.A.2 under “Primary Plans Required by the Tier A MS4 NJPDES Permit.” This serves the same purpose as a definition. Finally, the Department chose not to define “measurable goal” in the Tier A MS4 NJPDES permit. The Department notes that this term is not defined in state or federal regulations. However, Page 13 of the Fact Sheet states that “the Department considers a “measurable goal” to be a specific action taken to implement a BMP, rather than a specific condition of stormwater or receiving water quality that is supposed to result from implementing a BMP.”

No changes have been made to the final permits as a result of this comment.

76. **Comment:** Commenter 27 states that in Part IV.B.1.h "major development" is defined as disturbing one or more acres. However, N.J.A.C. 7:8-1.2 (Definitions) defines major development as "... any "development" that provides for ultimately disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more." Commenter 27 suggests that the Department add “or increasing impervious surface by one-quarter acre or more” back into the definition in the permit. [27]
77. **Comment:** Regarding the definition of “major development” in Part IV.B.1.h, Commenter 33 suggests the addition of the words "or the addition of 1/4 acre or more of impervious cover." Commenter 33 states that this change should also be made to all appropriate chapters and other cross references. [33]

Response 76-77: The Department disagrees with the suggestions in these comments as the Tier A and Tier B MS4 NJPDES permits serve to incorporate the definition of major development from other state regulations. Part IV.B.1.h of the Tier A and Tier B MS4 permits define major development as “any development that provides for ultimately disturbing one or more acres of land and any additional development defined as major development by a municipality’s stormwater control ordinance.” The definition at Part IV.B.1.h is consistent with the limited definition of major development applicable to the municipal stormwater management plans and ordinances found at N.J.A.C. 7:8-4.2(a), which is limited to projects that “ultimately disturb one or more acres of land.” The definition is also consistent with the scope of 40 CFR 122.34(b)(5), which requires a post-construction program to “address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre.”

However, note that both N.J.A.C. 7:8 and 40 CFR 122.34(b)(5) set forth minimum requirements for stormwater management. Tier A and Tier B Municipalities may adopt a stormwater control ordinance that defines major development subject to more stringent requirements.

No changes have been made to the final permits as a result of these comments.

78. **Comment:** Commenter 33 states that redevelopment should be defined within Part IV Notes and Definitions. Commenter 33 suggests that redevelopment be defined as the modification of a site by a change of use or alteration of characteristics, including impervious cover, topography, drainage or other physical aspects. [33]

Response 78: The Department disagrees with this comment. The Department maintains that it is more appropriate for redevelopment to be defined in other laws and regulations where the Tier A and Tier B MS4 NJPDES permits serve to incorporate those regulations. As described below, existing definitions found within the Local Redevelopment and Housing Law, Stormwater Management rules whereas the NJPDES MS4 permit covers redevelopment activities.

In the Local Redevelopment and Housing Law (N.J.S.A. 40A:12A), redevelopment is defined as:

“...clearance, replanning, development and redevelopment; the conservation and rehabilitation of any structure or improvement, the construction and provision for construction of residential, commercial, industrial, public or other structures and the grant or dedication of spaces as may be appropriate or necessary in the interest of the general welfare for streets, parks, playgrounds, or other public purposes, including recreational and other facilities incidental or appurtenant thereto, in accordance with are development plan.”

In N.J.A.C. 7:8, development is defined as:

“...the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or structure, any mining excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land for which permission is required under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.”

As stated within the Fact Sheet of the Tier A (page 19) and Tier B (page 14) MS4 NJPDES permits:

“The post construction stormwater management program...shall require compliance with the applicable design and performance standards established under N.J.A.C. 7:8 for major development. Major development is defined in this permit in the Notes and Definitions section as follows:

“Major development” means any development that provides for ultimately disturbing one or more acres of land and any additional development defined as “major development” by a municipality’s stormwater control ordinance. Disturbance is the placement of impervious surface or exposure and/or movement of soil or bedrock or clearing, cutting, or removing of vegetation. Projects undertaken by any government agency which otherwise meet the definition of “major development” but which do not require approval under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., are also considered “major development.”

No changes have been made to the final permits as a result of this comment.

79. **Comment:** Commenter 33 states that the word “permanent structure” is used within the definition of “permanent structure” at Part IV.B.1.m and could be changed. [33]

Response 79: While the Department agrees that the definition of “permanent structure” includes the use of the term “permanent structure,” the Department maintains that the definition is robust and that inclusion of this term within the definition is acceptable. The definition of Permanent structure is as follows:

- “m. “Permanent structure” means a permanent building or permanent structure that is anchored to a permanent foundation with an impermeable floor, and that is completely roofed and walled (a door is recommended, but not required). A fabric frame structure is a permanent structure if it meets the following specifications:
- i. Concrete blocks, jersey barriers or other similar material shall be placed around the interior of the structure to protect the side walls during loading and unloading of de-icing materials;
 - ii. The design shall prevent stormwater run-on and run through and the fabric cannot leak;
 - iii. The structure shall be erected on an impermeable slab;
 - iv. The structure cannot be open sided; and
 - v. The structure shall have a roll up door or other means of sealing the access way from wind driven rainfall.”

No changes have been made to the final permits as a result of this comment.

80. **Comment:** Commenter 33 questions if the definition of stormwater at Part IV.B.1.q includes groundwater infiltration. [33]

Response 80: Part IV.B.1.q is stated as follows:

- “q. “Stormwater” means water resulting from precipitation (including rain and snow) that runs off the land’s surface; is transmitted to the subsurface; is captured by separate storm sewers or other sewerage or drainage facilities; or is conveyed by snow removal equipment.”

Because this definition includes the phrase, “precipitation . . . that . . . is transmitted to the subsurface,” groundwater infiltration is included within the definition of stormwater.

No changes have been made to the final permits as a result of this comment.

81. **Comment:** Commenter 22 asks that the Department consider adding the following sentence at the end of Notes and Definitions Part IV.B.1.r: “Stormwater facilities do not include ‘State open waters’ as defined at N.J.A.C. 7:7A-1.4.” Commenter 22 states that it is generally agreed that streams, including very small streams, are not “stormwater facilities” or “stormwater conveyances” (which under this Part IV.B.1.r definition are “stormwater facilities”) that the Tier

A MS4 NJPDES permit can require Tier A Municipalities to regulate. Commenter 22 continues by stating that naturally occurring streams do not fit the meaning of “facility” which is something that is built for a specific purpose such as a building or large piece of equipment. Commenter 22 states that even if a naturally occurring stream is piped, relocated, or otherwise modified by human activity, such a stream was still not “built” (unlike detention basins, retention basins, etc. that clearly are “built”).

Commenter 22 continues by stating that N.J.A.C. 7:14A-4.2(c) provides in part that “it is the duty of any person who is or will be an operating entity for any part of a facility which includes a discharge or activity regulated pursuant to this chapter to obtain a NJPDES permit.” Municipalities and other parties are not considered to be “operating entities” of streams, including very small streams, whereas municipalities and other parties are routinely considered to be “operating entities” of detention basins, retention basins, etc. Moreover, streams generally do not contribute to the MS4 and MMY discharges authorized by Part II.A.2 of the draft Tier A MS4 NJPDES permit (and many streams instead receive such discharges). The draft Tier A permit is an MS4 and MMY discharge permit; it is not also a stream channel management permit.

Commenter 22 continues by stating that in areas where natural drainage has been modified, it is not easy to distinguish channels that should be considered very small streams from channels that should be considered “stormwater conveyances” and “stormwater facilities.” If the Department officially considers the channel in question to be “State open waters,” then this channel should not be considered “stormwater facilities” under the Tier A MS4 NJPDES permit. [22]

Commenter 22 submits a similar comment regarding the definition of “stormwater facility” for the Tier B MS4 NJPDES permit. Commenter 22 suggests adding the following sentence at the end of Notes and Definitions Part IV.B.1.r: “Stormwater facilities do not include ‘State open waters’ as defined at N.J.A.C. 7:7A-1.4.”

Response 81: Part IV.B.1.r of the Tier A and Tier B MS4 NJPDES permit is stated as follows:

“r. Stormwater facility” includes, but is not limited to: catch basins, detention basins, retention basins, filter strips, riparian buffers, infiltration trenches, sand filters, constructed wetlands, wet basins, bioretention systems, low flow bypasses, and stormwater conveyances. Stormwater facilities include structural stormwater management measures.”

The Department disagrees with the change to this definition as suggested in this comment. The NJPDES Municipal Stormwater Regulation Program is authorized under N.J.A.C. 7:14A as administered through the Division of Water Quality. However, the definition of “State open waters” as referenced in this comment is included in N.J.A.C. 7:7A-1.4 and pertains to the Freshwater Wetlands Protection Act, administered through the Division of Land Use Regulation. The definition of “State open waters” in N.J.A.C. 7:7A-1.4 excludes “Stormwater management facilities created in uplands;” however, it also includes language that allows the Department to determine, on a case-by-case basis, that a stormwater facility is a State open water. Therefore, it

would not be accurate to add “Stormwater facilities do not include ‘State open waters’ as defined at N.J.A.C. 7:7A-1.4” to the definition of “stormwater facility” in the MS4 NJPDES permits.

No changes have been made to the final permits as a result of this comment.

Part IV.A, Permit Overview

Tier A and Tier B MS4 NJPDES Permits

82. **Comment:** Part IV.A.1.a includes an overview of the Tier A MS4 NJPDES permit. Commenter 18 suggests that this paragraph be replaced with the following to reflect revisions made by the MS4 Remand Rule to the Phase II regulations:

“The Tier A Municipality (i.e. the permittee) is required to develop, update, implement and enforce an MS4 stormwater program. A primary objective of the MS4 stormwater program is to implement best management practices and other measures that are designed to achieve the permit’s requirement ~~which serve~~ to reduce the discharge of pollutants from the Tier A Municipality’s MS4, municipal maintenance yards and other ancillary operations, to the maximum extent practicable pursuant to N.J.A.C. 7:14A-25.6(a)1 and 40 CFR § 122.34(a) to protect water quality and to satisfy the applicable water quality requirements of the Clean Water Act.” [18]

Response 82: The Department agrees with this change clarifying this overview statement and has incorporated such in the final permit. This change affects Part IV.A.1.a of the final Tier A MS4 NJPDES permit.

83. **Comment:** Commenter 33 questions if there is any form of submission, review, and approval criteria for the SPPP and the MSWMP as referenced in Part IV.A. [33]
84. **Comment:** Commenter 15 states that the draft permit does not fully satisfy requirements for the Department to ensure that all permittees reduce their discharges of pollution to the maximum extent practicable (“the MEP standard”). Commenter 15 states that the Department is required to address the partial remand by the U.S. Court of Appeals for the Ninth Circuit of the “Phase II” federal stormwater rules (EPA Permit Review). The Ninth Circuit ruled that it is the responsibility of the permitting authority to determine whether each municipality seeking coverage under an MS4 permit is meeting the MEP standard (Environmental Defense Center v. EPA, 344 F.3d 832, 855-56 (9th Cir. 2003) (hereinafter “EDC”)). It is not enough for a permit to direct a permittee to make a plan, on its own without regulatory and public oversight, to reduce discharges to the MEP; the permitting authority must verify that the MS4s’ plans actually meet the MEP standard. According to the court:

“[S]torm water management programs that are designed by regulated parties must, in every instance, but subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.” (EDC).”

EPA has enacted revisions to the Phase II stormwater regulations to implement this ruling, which have been in effect since January 9, 2017 and apply to this permit renewal. In those revisions, the agency describes the underlying requirement that its revised regulations must meet, according to the Ninth Circuit:

“To address the remand, the regulations must ensure that permitting authorities determine what permit requirements are needed to reduce pollutants from each permitted small MS4 ‘to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act’ (referred to hereinafter as the ‘MS4 permit standard’). The rule must also require NPDES permitting authorities to provide the public with the opportunity to review, submit comments, and request a public hearing on these permit requirements.” (81 Fed. Reg. 89,320 (Dec. 9, 2016))

Commenter 15 states EPA has established two options for permitting approaches that a regulatory authority can use to issue NPDES general permits for small MS4s and meet the requirements of the court remand. The first option (the “Comprehensive General Permit” approach) is to establish all necessary permit terms and conditions to require the MS4 operator to reduce the discharge of pollutants from its MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act (“MS4 permit standard”) upfront in one comprehensive permit. The second option (the “Two-Step General Permit approach”) allows the permitting authority to establish the necessary permit terms and conditions in two steps: a first step to issue a base general permit that contains terms and conditions applicable to all small MS4s covered by the permit and a second step to establish necessary permit terms and conditions for individual MS4s that are not in the base general permit.

Commenter 15 continues by stating that the Department must follow one of these options when it renews the Tier A permit. The Department apparently does not intend to select the Two-Step General Permit approach, as it does not require existing permittees to submit any information at all, not even a Request for Authorization (RFA) form; for new permittees, the RFA form provides only what EPA called, in its 2014 permit review, “the most basic contact information for the permittee” (EPA Permit Review at 2.). As a result, no permittees are required to submit any substantive information about their proposed pollution control programs for the Department to evaluate. Consequently, we infer that the Department has selected the Comprehensive General Permit approach. Commenter 15 supports the use of EPA’s Comprehensive General Permit approach for the Statewide Basic Requirements, and recognizes the Department’s good faith efforts to comply with that option. In order to implement these intentions in the language of the permit, we urge the Department to strengthen the SBR requirements so that each one of them satisfies the “clear, specific, measurable” standard articulated by EPA. If it does not do so, then the Two-Step General Permit approach will be necessary, meaning that the Department will need to solicit information from permittees about their proposed actions and determine, prior to granting authorization to discharge, whether those proposals would meet the MEP standard.

The Department has succeeded in including many “clear, specific, and measurable” provisions in

the permit, such as the public outreach “point system,” minimum frequencies for outfall pipe inspections, and generally more direct and enforceable language throughout the permit. However, some provisions in the permit do not meet the “clear, specific, and measurable” standard that EPA articulated in its proposal – the standard that is necessary to ensure that each permittee in fact reduces its discharge of pollution to the maximum extent practicable. As a general matter, the permit should not direct MS4s to “develop” certain programs (as a permit cannot delegate responsibility to a permittee to develop its own pollution control requirements), but rather should direct MS4s to “implement” and/or “enforce” the program elements already required by the permit. This terminology should be changed in sections IV.B.4.g, IV.B.5.a.v, IV.B.5.b, IV.B.5.d, IV.B.6.b, IV.B.6.c, and IV.C.1.a-b. The common element among these provisions is the fact that they would allow permittees to comply using a range of implementation measures, many of which may not represent the maximum effort that is practicable to ensure that MS4s will meet the MEP standard. [15]

Response 83-84: The Tier A MS4 NJPDES permit does not require municipalities to submit the SPPP to the Department as this would not be practical nor is it required by federal rules. Regarding permit requirements for small MS4 permits, 40 CFR 122.34(b) states:

“The permit must also require a written storm water management program document or documents that, at a minimum, describes in detail how the permittee intends to comply with the permit’s requirements for each minimum control measure.”

In the summary of its adoption of 40 CFR 122.34(b), EPA discusses the relationship between what it describes as the stormwater management program and required permit terms and conditions. Note that EPA uses the term “stormwater management program” (SWMP) which is the equivalent of the SPPP required by the Tier A MS4 NJPDES permit. In explaining this requirement, EPA states,

“The fact that the SWMP is an external tool and not required to be part of the permit is intended to enable the MS4 permittee to be able to modify and retool its approach during the course of the permit term in order to continually improve how it complies with the permit and to do this without requiring the permitting authority to review and approve each change as a permit modification.” (81 FR 89340, Dec. 9 2016)

The Department will be able to verify compliance with this standard through the conduct of routine enforcement inspections, the reviewing of annual reports and enforcement logs as well as through the municipal stormwater audit process.

Similarly, the MSWMP is not required to be submitted to the Department for approval. As stated on page 6 of the Tier A MS4 NJPDES permit Fact Sheet:

“The Stormwater Management rules at N.J.A.C. 7:8 set forth the required components of a Municipal Stormwater Management Plan (MSWMP). As an integral part of a municipality’s master plan, the MSWMP details the municipality’s strategy, measures, and process to manage post construction stormwater runoff from new development and redevelopment to

ensure compliance with N.J.A.C. 7:8. The MSWMP is a significant component of the Stormwater Pollution Prevention Plan (SPPP), which is a requirement under this Tier A MS4 NJPDES permit and consistent with the written stormwater management program document required by 40 CFR 122.34(b).”

The Tier A MS4 NJPDES permit requires the municipality to submit the adopted plan for approval to the County review agency in accordance with N.J.A.C. 7:8-4; to notify the Department and post the approved plan and any amendments on its website (or otherwise comply with the notification requirements of N.J.A.C. 7:8-4.4(e)); and review and update its MSWMP as necessary, and as a part of the reexamination of its municipal master plan in accordance with N.J.A.C. 7:8-4.3(c) and (d).

No changes have been made to the final permits as a result of this comment.

Part IV.B, SBRs and Associated Conditions

1. Minimum Standards for Public Involvement and Participation Including Public Notice (Tier A MS4 NJPDES Permit only)

85. **Comment:** Commenter 15 states that other than the requirement to post certain documents online, the public involvement and participation section of the permit contains no specific tasks for the MS4 to complete or measurable, objective performance standards for involving the public. Commenter 15 states that the permit should incorporate a measurable component, such as a requirement to provide a certain number of public engagement activities or public input opportunities each year, or over the permit term. Commenter 15 further states that the permit could further provide a list of suggested opportunities for public involvement such as public hearings, volunteer monitoring or clean-up activities, stormwater management panels that include citizen representatives. Commenter 15 particularly urges the Department to require permittees to provide an annual opportunity for the public to engage in review or implementation of the MS4’s SPPP and/or MSWMP. Commenter 15 also requests that the permittee be required to post all stormwater management plans and ordinances on their websites without exception. [15]

Response 85: The Department disagrees with the assertion that the Tier A MS4 NJPDES permit does not fulfill requirements for complete or measurable, objective performance standards for involving the public. As stated on page 16 of the Fact Sheet:

“...this draft Tier A MS4 NJPDES permit ensures notification opportunity for public involvement in those elements of the Tier A Municipality’s stormwater program that are the aegis of local authority, and ensures transparent development, updating and implementation of a Tier A Municipality’s stormwater program.”

Specific requirements for public involvement and participation are included throughout the Tier A MS4 NJPDES permit. As per Part IV.B.1.a, municipalities are required to comply with applicable State and local public notice requirements when providing for public participation in

the development and implementation of a MS4 stormwater program including the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq), statutory procedures for the enactment of ordinances (N.J.S.A. 40:49-2), and the Municipal Land Use Law (N.J.S.A. 40:55D-13, 28, and 94 and N.J.S.A. 40:55D-12). As per Part IV.B.1.d, municipalities shall maintain records necessary to demonstrate compliance with the public participation requirements of Part IV.B.1.a. and must certify annually that all public notice requirements are met. This certification is submitted to the Department as part of the annual report. As per Part IV, the location of associated municipal records regarding public notice and participation must be referenced within the municipality's SPPP.

As included separately in the SBR for Local Public Education and Outreach (Part IV.B.2), municipalities have the ability to further enhance community involvement through public education and outreach activities. For example, a municipality may create a Regional Stormwater Collaboration under Category 4: Watershed/Regional Collaboration found in Attachment B. A Regional Stormwater Collaboration as defined in Attachment B, is when a municipality participates “in a regional stormwater, community collaborative or other watershed-based group on a regular basis to discuss impaired waterbodies, TMDLs, regional stormwater related issues, or watershed restoration plans that address those waterbodies. Evaluate, develop and implement remedies that resolve stormwater-related issues within the affected waterbody or watershed.” A Regional Stormwater Collaboration provides an opportunity for the public to engage in the review or implementation of the SPPP and/or Municipal Stormwater Management Plan.

In sum, the Department maintains that many of the suggestions in this comment are already included within the permit.

No changes have been made to the final permit as a result of this comment.

86. **Comment:** Commenter 15 states that any comments relating to the common elements that the draft Tier B MS4 NJPDES permit shares with the draft Tier A MS4 NJPDES permit, namely, the public outreach “points system,” the post-construction standards for new and redevelopment, and stormwater facility maintenance, apply equally to the draft Tier B MS4 NJPDES permit. Commenter 15 urges the Department to strengthen the draft Tier B MS4 NJPDES permit in the same manner as recommended for the draft Tier A MS4 NJPDES permit. [15]

Response 86: Tier B municipalities are generally located in more rural areas and in non-coastal regions. Similar to the Tier A MS4 NJPDES permit, the Tier B MS4 NJPDES permit contains improved permit conditions for local public education and outreach, post-construction stormwater management in new development and redevelopment, and stormwater facility maintenance. The minimum standard for local public education has been enhanced to require Tier B Municipalities to annually conduct activities that total at least 12 points.

The Tier B MS4 NJPDES permit contains a subset of the Tier A MS4 NJPDES permit provisions including requirements that pertain to local public education and outreach, post-construction stormwater management for new development and redevelopment, and requirements to ensure

public and private stormwater facility operation and maintenance. Part IV.B.2 of the Tier B MS4 NJPDES permit now explicitly states the Tier B Municipality's responsibility for reviewing development and redevelopment applications and requires the Tier B Municipality to complete a Major Development Stormwater Summary for each structural and non-structural stormwater measure incorporated into a major development application. Attachment E (Part IV.B.2) of the Tier B MS4 NJPDES permit provides the same clear language as the Tier A MS4 permit about the Tier B Municipality's responsibility for ensuring maintenance on both municipally owned and operated facilities and privately owned and operated facilities. The Department maintains that these improvements constitute reasonable progress toward reducing the discharge of pollutants to the maximum extent practicable.

Please refer to **Response 105** regarding responses to concerns raised by Commenter 15 regarding the application of the post-construction standards for new and redevelopment. Similarly, please refer to **Response 184** regarding responses to concerns raised by Commenter 15 regarding public and private stormwater facility operation and maintenance.

No changes have been made to the final permit as a result of this comment.

87. **Comment:** Commenter 11 suggests that Part IV.B.1.b be changed as follows:

“Make elements of the MS4 program available to the public upon written request subject to OPRA request and post copies of the SPPP, MSWP and related ordinances on the Municipal web site.” [11]

Response 87: Part IV.B.1.b as referred to in this comment is stated as follows:

“b. Tier A Municipalities shall make elements of its MS4 stormwater program available to the public:

- i. Provide the current SPPP upon request as required by Part IV.F.1.g (SPPP);
- ii. Post the current SPPP on its website to the extent required by Part IV.F.1.f (SPPP); and
- iii. Post the current MSWMP and all ordinances required by this permit on its website or otherwise comply with the notification requirements of N.J.A.C. 7:8-4.4(e). See Part IV.B.4.f (MSWMP), 4.g (Stormwater Control Ordinance), 5.a (Community Wide Ordinances).”

The permit condition as written ensures that the SPPP, MSWP and related ordinances be posted on the Tier A Municipality's website which ensures public access to the material. In addition, the permit condition as written is more in line with the Department's intent for a transparent public participation process whereas the wording change suggested by the commenter implies that an OPRA Request would be needed in order to view the material.

No changes have been made to the final permit as a result of this comment.

Part IV.B, SBRs and Associated Conditions

2. Minimum Standards for Local Public Education and Outreach (Tier A and Tier B MS4 NJPDES Permits), Attachment B (Tier A and Tier B MS4 NJPDES Permits)

88. **Comment:** Commenter 3 expresses concern regarding Part IV.B.2 which requires Tier A Municipalities (i) to implement public education and outreach programs and educational pollution prevention activities about the impacts of stormwater discharges on surface water and groundwater and to involve the public in reducing pollutants in stormwater and mitigating flow, and (ii) to annually conduct activities that total at least 12 points and include activities from at least 3 of the 5 categories set forth in Attachment B. [3]
89. **Comment:** Commenter 17 expresses concern that the permit increases the annual number of points required for Local Public Education and the point category requirement should be reconsidered as the need for an increase with different categories is unclear. Commenter 17 states that some activities, such as school presentations which require substantial preparation, are not awarded commensurate points (1 point per presentation) and that hours of preparation, meetings and costs to prepare materials are not recognized. [17]
90. **Comment:** Commenter 29 states that the minimum number of points has increased and a variety of categories of activities must be addressed. However, the level of effort and the costs required to collaborate with local school or community groups does not seem balanced with the point values that can be achieved. [29]
91. **Comment:** Regarding Part IV.B.2.a, Commenter 16 questions why the current points system can not be retained from the previous permit as the new points system makes it more difficult for municipalities to comply. Commenter 16 states that the proposed annual education points system requirements are onerous and will require countless hours of coordination and meetings in addition to the cost of materials to produce signs and presentation materials. Commenter 16 states that time and resources are better spent in performing job responsibilities such as designing capital projects, reviewing and overseeing development, maintaining and repairing our infrastructure and carrying out official duties. The Department should be tasked with the responsibility of educating the public and this should not be tasked to local government employees who are not educators. [16]
92. **Comment:** Commenter 13 expresses concern that their Townships will be required to conduct annual activities that total at least 12 points (previously 10 points) and include activities from at least three of the five categories, three of which are new. Commenter 13 states that the new point system requires significantly more staff time than current requirements, as they attempt to successfully coordinate same with an outside group or agency. Commenter 13 states that in the past, compliance with this requirement had been achieved by having the annual mailing, ordinance education and handouts during Arbor Day for the previously required 10 points. However, these same educational mailings and handouts will now only amount to 6 points and are credited from one category. There will also be budget implications to purchase activity

materials and supplies. Commenter 13 suggests that the points for these newer activities be higher than currently proposed given their greater reliance on staff and budgets. [13]

93. **Comment:** Commenter 18 supports the Department's decision to increase the minimum number of public outreach activities that permittees must carry out each year, raising the annual "points" target from 10 to 12. MS4 permit requirements should evolve and become more robust with each successive permit cycle in order to drive continual improvements in water quality. As Commenter 18 explains that when it established its MS4 permitting regulations, stormwater permits will "evolve and mature over time." Commenter 18 "envision[s] application of the MEP standard as an iterative process" through which permit requirements "continually adapt to current conditions and BMP effectiveness." In other words, successive iterations of permits for a given jurisdiction will necessarily evolve and contain new and more stringent requirements over time, such as the requirement to achieve 12 education and outreach "points" instead of 10. [18]

Response 88-93: Although the Department has increased the number of points required for Public Education and Outreach Activities from 10 to 12 points, the options listed under Attachment B - Points System for Public Education and Outreach Activities have also been expanded to allow the municipality greater flexibility in choosing how to satisfy the minimum control measure requirements. Consistent with 40 CFR 122.34(a), the Public Education and Outreach permit conditions represent the Department's determination of an appropriate, iterative step in assuring reasonable progress towards achieving the MS4 permit standard to the maximum extent practicable.

As per EPA's, "Stormwater Phase II Final Rule: Public Education and Outreach Minimum Control Measure" discussed in 40 CFR 122.34(b)(1), the Department must require a regulated small MS4 to comply with the following minimum requirements:

- Implement a public education program to distribute educational materials to the community, or conduct equivalent outreach activities about the impacts of stormwater discharges on local waterbodies and the steps that can be taken to reduce stormwater pollution; and
- Determine the appropriate best management practices (BMPs) and measurable goals for this minimum control measure including program implementation approaches and BMPs (i.e., the program actions/activities).

Changes to the options listed under Attachment B, as compared to the options in the 2009 Tier A and Tier B MS4 NJPDES permits, are intended to ensure that education and outreach materials are distributed to a broader audience through a variety of media in order to increase the number of different people receiving the information. When a message is sent the same way, year after year, the effectiveness of that message and the audience it reaches will be diminished. Note that Attachment B has also been expanded to allow for more action oriented events such as litter clean-ups and water education workshops. These events may already be occurring within a community where the municipality is encouraged to track these events for credit.

With regards to the amount of time required to develop a school presentation to satisfy the requirements of Attachment B, a municipality may put together one school presentation for reuse and earn up to five points once presented five times (one point earned for each time presented). Once developed, this presentation can be reused in subsequent years. MS4 permittees may use stormwater educational information provided by the Department, the EPA, or environmental, public interest, or trade organizations instead of developing their own materials. The Department has educational material available on www.cleanwater.nj.org that is free and available to all municipalities as well as the public.

The Department does not recommend having just one individual within the municipality implement the stormwater program, rather it is advantageous to have people who possess a variety of skills from different areas. Municipalities can form a Stormwater Pollution Prevention Team that is made up of a wide variety of individuals responsible for overseeing the implementation of the various permit requirements that comprise a stormwater program. For example, this could include public work officials, municipal engineer(s), the municipal clerk, planning and zoning boards, code enforcement officers, and the environmental commission. Team members are not limited to only municipal personnel and could also include local volunteers, members of the local watershed association, environmental groups and educational professionals. An informed and knowledgeable community is crucial to the success of a stormwater management program and is beneficial when municipalities are attempting to establish new funding initiatives for the program in seeking volunteers to help implement the program. Properly educated citizens will more likely have a positive effect on the municipality's water quality.

No changes have been made to the final permits as a result of this comment.

94. **Comment:** Regarding Part IV.B.2.b, Commenter 18 recommends replacing the first sentence with “The Tier A Municipality shall permanently label all storm drains for those that do not have permanent wording cast into the structure of the inlet.” Commenter 18 states that this will prevent the loss of labeling due to temporary labeling such as paint, chalk, or signage which is susceptible to weathering.

Commenter 18 also suggests that the Tier A MS4 NJPDES permit require that privately owned or operated storm drain inlets (e.g. condominium association) within the permitted municipality be retrofitted and that these storm drain inlets have permanent labels. This requirement should also be included in Attachment C – Design Standards for Storm Drain Inlets. [18]

Response 94: Part IV.B.2.b is stated as follows:

- “b. The Tier A Municipality shall label all storm drain inlets for those drains that do not have permanent wording cast into the structure of the inlet. The Tier A Municipality shall also maintain the legibility of those labels and replace any labels that are missing or not legible. See the Tier A Municipal Guidance document (www.nj.gov/dep/dwq/tier_a_guidance.htm) for specific measures. This requirement shall include the following:

- i. All storm drain inlets along sidewalks that are adjacent to municipal streets;
- ii. All storm drain inlets within plazas, parking areas or maintenance yards that are operated by the municipality.”

The Department maintains that the permit condition as written ensures that labeling of storm drains remains legible and the change proposed by the commenter is unnecessary. Additionally, the option to stencil storm drain inlets provides municipal officials with flexibility in determining how to apply limited resources to comply with storm drain inlet labeling requirements yet also allows an opportunity for municipalities to engage members of the public in the application of the message so that the public becomes informed of the importance of allowing only stormwater into storm drain inlets. The act of labeling inlets provides a lasting lesson to individuals involved in the activity. In addition, applied labels typically include colors that improve visibility which is why the Local Public Education conditions of the Tier A and Tier B MS4 NJPDES permits allow the option of stenciling precast labels to improve legibility.

Regarding the suggestion of requiring municipalities to ensure that privately owned or operated storm drain inlets have permanent labels, note that this suggestion is beyond the authority of the Tier A and Tier B MS4 NJPDES permits which apply only to the MS4 system which is municipally owned.

No changes have been made to the final permits as a result of this comment.

95. **Comment:** Commenter 3 expresses concern regarding Attachment B under “Update Educational Materials.” Based on a limited review of supporting documents regarding education, Commenter 3 states that the materials should be updated and expanded since many are not current. [3]

Response 95: The Department agrees and has been in the process of updating educational materials that are available through www.cleanwater.nj.org where municipalities are encouraged to use content that is currently available on the site. However, municipalities are not limited to utilizing just the Department’s educational material. MS4 permittees may also use stormwater educational information provided by EPA, or environmental, public interest, or trade organizations when developing materials for public education and outreach.

No changes have been made to the final permits as a result of this comment.

96. **Comment:** In regards to educating businesses and the general public, Commenter 22 states that Part IV.B.2.a and Attachment B of the draft Tier A MS4 NJPDES permit do not comply with the final sentence of N.J.A.C. 7:14A-25.6(b)4. The full text of N.J.A.C. 7:14A-25.6(b)4 states:

“4. Public education on stormwater impacts: The permittee shall implement a public education program about the impacts of stormwater discharges on surface water and groundwater, and about the steps that the public can take to reduce pollutants in stormwater runoff. As part of

this education program, the permittee shall inform public employees, businesses, and the general public of hazards associated with illicit connections and improper disposal of waste.”

Commenter 22 states that Part IV.B.2.a and Attachment B require “educational and pollution prevention activities about the impacts of stormwater discharges on surface water and groundwater and to involve the public in reducing pollutants in stormwater and mitigating flow...” But even when the Attachment B point system is satisfied, these activities would not necessarily “inform ... businesses, and the general public of hazards associated with illicit connections and improper disposal of waste.” See also the closely related EPA small MS4 rules at 40 CFR 122.34(b)(3)(i)(D). Commenter 22 notes that informing public employees of such hazards is addressed by Parts IV.B.5.d.iii and d.vi. [22]

Response 96: The Department agrees that Attachment B could be improved to be better aligned with N.J.A.C. 7:14A-25.6(b)4. As a result, Attachment B – Points System for Public Education and Outreach Activities has been revised as follows:

“The Tier A Municipality shall annually conduct educational activities that total at least 12 points and include activities from at least three of the five categories found below. At a minimum, at least one of the activities shall involve educating businesses and the general public of hazards associated with illicit connections and improper disposal of waste. Each approved activity is listed below with an assigned point value. Additional information on how to conduct these Public Education and Outreach activities can be found under Notes and Definitions Part IV.A.3 and 4 of this Tier A MS4 NJPDES permit. Records shall be kept necessary to demonstrate compliance with this requirement, including date of activities and any other relevant documentation.”

Part IV.B.2.a is revised as follows:

“The Tier A Municipality shall implement a Public Education and Outreach Program that focuses on educational and pollution prevention activities about the impacts of stormwater discharges on surface water and groundwater and to involve the public in reducing pollutants in stormwater and mitigating flow. The Tier A Municipality shall annually conduct activities that total at least 12 points and include activities from at least three of the five categories as set forth in Attachment B (Points System for Public Education and Outreach Activities). At a minimum, at least one of the activities shall involve educating businesses and the general public of hazards associated with illicit connections and improper disposal of waste. Records shall be kept necessary to demonstrate compliance with this requirement, including date of activities and any other relevant documentation.”

The Department agrees that the development of informational brochures and guidance for specific audiences such as businesses, property owners, and the general public can better communicate hazards associated with illicit connections and improper disposal of waste. To communicate this information a municipality might consider the activity, Ordinance Education listed under “Category 2: Targeted Audiences Outreach” of Attachment B where the municipality has the option to:

“...distribute a letter or e-mail from the mayor or municipal official to every resident and business in the municipality highlighting the requirements and environmental benefits of the Pet Waste, Wildlife Feeding, Litter Control, Improper Disposal of Waste, Containerized Waste/Yard Waste Collection, Private Storm Drain Inlet Retrofitting and Illicit Connection ordinances and provide a link to the municipal website where subject ordinances are posted.”

As an alternative to developing their own materials, municipalities may use stormwater educational information provided by the Department, EPA, or environmental, public interest, or trade organizations. The Department has educational material available on www.cleanwater.nj.org that is free and available to all municipalities as well as the public. The Department is also currently in the process of updating educational materials.

This change affects Attachment B of the Tier A and Tier B MS4 NJPDES permits.

97. **Comment:** Commenter 22 states that in Attachment B of the Tier A and Tier B MS4 NJPDES permits there is improper overlap between some activities in “Category 4” (“Watershed/Regional Collaboration”) and “Category 5” (“Community Involvement Activities”), which allows improper double counting of points for the same activity. In particular, organizing or participating in a single rain barrel workshop qualifies as both a Category 4 “Green Infrastructure Workshop” activity (3 points) and a Category 5 “Rain Barrel Workshop” activity (3 points). Also, organizing or participating in the organization of a single “community event to carry out stormwater activities” qualifies as both a Category 4 “Community Activity” (3 points) and a Category 5 “Community Event” activity (3 points). [22]

Response 97: The Department agrees that there is overlap between activities in Category 4: Watershed/Regional Collaboration and Category 5: Community Involvement Activities. Language in the activity titled, “Green Infrastructure Workshop” under Category 4 in Attachment B is revised as follows:

“Organize or participate in a rain barrel, rain garden or other green infrastructure workshop on a regional or watershed basis ~~for community residents~~. This could be a partnership exercise with a local watershed organization, utility, university, school, youth/faith based group, and/or other organization.”

The Department also agrees that the Category 4 “Community Activity” does not properly reflect the watershed or regional collaboration effort intended by the category. Language in the activity titled, “Community Activity” under Category 4 in Attachment B is revised in the final permit, as follows:

“Organize or participate in the organization of a ~~community~~ regional or watershed based event to carry out stormwater activities such as stormwater facility maintenance or litter clean-up. The municipality may identify and enter into a partnership agreement with a local group such as a watershed organization, utility, university, school, youth/faith based group, and/or other organization to carry out these activities.”

This change affects Attachment B of the Tier A and Tier B MS4 NJPDES permits.

98. **Comment:** Commenter 22 states that the words “or CSO related gray and green infrastructure sites” should be deleted in Attachment B from the “Community Involvement” activity in “Category 5” (“Community Involvement Activities”). Commenter 22 states that creating and posting signs at these CSO related sites would not reduce pollutants in the discharges authorized by Part II.A.2 of the Tier A MS4 NJPDES permit namely discharges from small MS4s and municipal maintenance yards or other ancillary operations. Commenter 22 raises the same comment for the Tier B MS4 NJPDES permit. [22]

Response 98: The Department agrees that the use of the term “CSO” in Category 5: Community Involvement Activities is not consistent with the scope in Part II.A.2. As a result, language in the activity titled, “Community Involvement” under Category 5 in Attachment B is revised in the final permit, as follows:

“Organize a project with a local organization to create and post signs at ~~green infrastructure, stormwater facility, or CSO related gray and green infrastructure sites~~ either green and/or gray stormwater infrastructure sites or facilities that describe the function and importance of the facility, contact phone number, municipal identification number, and/or website for more information.”

This change affects Attachment B of the Tier A and Tier B MS4 NJPDES permits.

99. **Comment:** Under Attachment B, “Category 5: Community Involvement Activities,” Commenter 27 suggests that in addition to Rain Barrel and Rain Garden training/installation, workshops should include other activities as part of Optional Measures. Examples include targeting developed areas with sandy soils (such as Coastal Area Facility Review Act zones) for voluntary, community-wide downspout disconnection; and for updating ordinances to require downspout disconnection or other green infrastructure improvements as part of obtaining a Certificate of Continuing Occupancy when an existing house is sold. [27]

Response 99: There is flexibility in the requirements of Attachment B and some of the suggestions within this comment could qualify and therefore do not need to be designated as an Optional Measure. In response to the commenter’s reference to downspout disconnection workshops, the Department considers workshops that target developed areas with sandy soils for voluntary and community-wide downspout disconnection as a green infrastructure workshop under “Category 4: Watershed/ Regional Collaboration.” A municipality also has the option of creating a downspout disconnection program within their community which can be used to educate the public while also helping to reduce flooding, increase recharge, and improve water quality. A downspout disconnection program would be accepted as a community activity under Category 4 as well. However, regarding the suggestion of updating ordinances for downspout connection or requiring GI improvements as part of obtaining a Certificate of Continuing Occupancy when a house is sold, note that these suggestions are outside the scope and authority of the Tier A and Tier B MS4 NJPDES permits.

No changes have been made to the final permits as a result of this comment.

100. **Comment:** Commenter 27 suggests that an additional requirement be added to Part IV.B.2 and Attachment B to require owners of stormwater outfalls to post advisory signs on outfalls that discharge by surface water used for primary and secondary contact recreational activities. Commenter 27 states that this requirement is authorized under N.J.A.C. 7:14A-25.6(b)3.iv.4 which states:

“Public education on stormwater impacts: The permittee shall implement a public education program about the impacts of stormwater discharges on surface water and groundwater, and about the steps that the public can take to reduce pollutants in stormwater runoff.”

The wording for these signs regarding the “impacts of stormwater discharges” could include language from “Stormwater Facility Signage” in “Category 1: General Public Outreach” and language cautioning swimmers to avoid contact with water near flowing storm drains. Commenter 27 suggests that municipalities could receive five points for completion of advisory signs. [27]

Response 100: The Department disagrees with this suggested permit change. Any advisory signs to caution swimmers against swimming near stormwater outfalls should be based on site-specific information and water quality data. Beach monitoring is performed under the Cooperative Coastal Monitoring Program as administered by the Department with the participation of local environmental health agencies (see www.nj.gov/dep/wms/bmw).

However, note that signs can be posted as a part of public education and outreach programs for a different purpose. Under Attachment B, the Department allows the municipality the option to post “Stormwater Facility Signage” where the municipality may “post signs at municipally-owned stormwater management basins or other structural stormwater related facilities that describe the function and importance of the facility, contact phone number, municipal identification number, and/or website for more information.”

No changes have been made to the final permits as a result of this comment.

101. **Comment:** Regarding the Tier B MS4 NJPDES permit, Commenter 22 states that under Attachment B, the Category 2 (Target Audiences Outreach) activities of “Stormwater Management Training” and “Municipal Board and Council Member Related Training” should not be included with “public education.” Commenter 22 states that instead these requirements belong in the Part IV.B.2 standards for Post Construction Stormwater Management.

Commenter 22 states that if there is a sound basis for making this training in the Tier A MS4 NJPDES permit, then there is no sound basis for not making the training mandatory in the Tier B MS4 NJPDES permit. Commenter 22 also questions whether the Department has adequate legal authority to make this training mandatory for Tier B municipalities. [22]

Response 101: Attachment B of the Tier B MS4 NJPDES permit contains a menu of available options that Tier B Municipalities can choose to implement a Public Education and Outreach Program. Attachment B includes five categories with a total of 27 options. As one of the options, the Tier B Municipality can require design engineers, municipal engineers and other individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality to complete Department approved Stormwater Management Design Review Course as described in Part IV.B.2.

The Department disagrees with the inclusion of “Stormwater Management Training” and “Municipal Board and Council Member Related Training” as a mandatory requirement in Part IV.B.2. These training requirements stem from N.J.A.C. 7:14A-25.6(b)3.ii which pertain to Tier A Municipalities only.

No changes have been made to the final permit as a result of this comment.

Part IV.B, SBRs and Associated Conditions

3. Minimum Standards for Construction Site Stormwater Runoff (Tier A MS4 Permit only)

102. **Comment:** Regarding Part IV.B.3.a, Commenter 18 states that the draft permit does not include provisions consistent with requirements under the minimum control measure for construction site stormwater runoff control at 40 CFR 122.34(b)(4) nor does it include provisions concerning the remaining requirements under 40 CFR 122.34(b)(4). Commenter 18 also states that the permit does not include the requirement for MS4s to develop and implement an ordinance or other regulatory mechanism to require erosion and sediment controls and sanctions to ensure compliance. Finally, the permit does not include clear, specific, and measurable requirements for MS4s to conduct construction site plan reviews, and inspections and enforcement of construction sites, Commenter 18 asks that the Department clarify how each of the requirements under 40 CFR 122.34(b)(4) is met. [18]
103. **Comment:** Commenter 14 states that it is not clear if the construction site storm water controls contains the six required elements or if the State’s included elements are effective. Without such components, it is unclear if the MS4 permit meets the federal minimum standards (see 44 [40] CFR 122 et seq.). Additionally, Commenter 14 states that it is not clear if the permit includes a regulatory mechanism to require erosion and sediment controls and sanctions to ensure compliance. Commenter 14 questions if the Department is relying on regulatory mechanisms of other state agencies (e.g., N.J. Department of Agriculture). Commenter 14 also states that the permit also does not include clear, specific, and measurable requirements for construction site plan reviews and inspections and enforcement of construction sites. [14]

Response 102-103: The Department agrees that construction site runoff control is a six minimum measure under 40 CFR 122.34(b)(4). However, the Department includes those measures in a separate stormwater general permit namely the “Construction Activity Permit” (NJPDES Permit No. NJ0088323) as allowable under state regulations where those permit conditions are consistent with federal regulations. N.J.A.C. 7:14A-24.10 (Additional

requirements for stormwater discharges associated with construction activity) sets forth requirements applicable to stormwater discharges associated with small construction activity and to stormwater discharges associated with construction activity as defined or described at N.J.A.C. 7:14A-1.2. N.J.A.C. 7:14A-24.10 is based on 40 CFR 122.44(s) and 122.34(b)(4). Under those federal regulations, NPDES permit conditions for these construction stormwater discharges to surface water may incorporate "qualifying" State or local erosion and sediment control program requirements by reference. N.J.A.C. 7:14A-24.10 requires that the NJPDES program of general and/or individual permits for these discharges to surface water be designed to reduce pollutants in these discharges to surface water, and include the components listed in N.J.A.C. 7:14A-24.10(a)1 through 8. These components consist mainly of components that EPA regulations require in NPDES permit conditions for these discharges to surface water, or in the "minimum control measure" (which N.J.A.C. 7:14A-25.6(b) calls a "Statewide Basic Requirement" or "SBR") for control of construction site stormwater runoff discharged to small MS4s.

N.J.A.C. 7:14A-24.10(a)1 recognizes that in New Jersey, erosion and sediment from construction activities is regulated under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq., and implementing rules. Therefore, construction site stormwater runoff control is not implemented by the Tier A Municipality and Tier A MS4 permittees do not have to include this SBR in their stormwater programs (see N.J.A.C. 7:14A-25.6(b) 2 and 25.7(b)). However, construction activities are administered by the Department in coordination with the New Jersey Department of Agriculture and the State Soil Conservation Committee through its Soil Conservation Districts located throughout the State. Applicants must first obtain a Soil Erosion and Sediment Plan (251 Plan) approval from the appropriate Soil Conservation District and then seek coverage under the Construction Activity Permit. Compliance is handled through the Soil Conservation Districts in conjunction with the Department's Water Compliance and Enforcement program. Each construction site is inspected for compliance with the operator's 251 Plan and the Construction Activity Permit.

The following lists the core requirements of 40 CFR 122.34(b)(4)i along with a description of how the Department's program addresses each requirement:

Under 40 CFR 122.34(b)(4)(i)(A) the MS4 permit must require the permittee to develop, "An Ordinance or other regulatory mechanism to require erosion and sediment controls . . ." The Department does not require MS4 permittees to adopt a construction site ordinance since the regulation of the activity is directly regulated by the State as described above.

Under 40 CFR 122.34(b)(4)(i)(B) the MS4 permit must require the permittee to develop, "Requirements for Construction operators to implement appropriate erosion and sediment control best management practices." The Department requires construction site operators to obtain a Soil Erosion and Control Plan (251 Plan) from the local Soil Conservation District for construction site activities. These local districts implement the soil erosion control regulations established by New Jersey Department of Agriculture at N.J.A.C. 2:29 et seq.

Under 40 CFR 122.34(b)(4)(i)(C) the MS4 permit must require the permittee to develop, “Requirements for construction site operators to control waste . . .” The Department requires construction site operators to obtain authorization under the Construction Activity Permit which establishes material management requirements to control liquid waste, waste handling to control litter and hazardous materials, and construction site wastes to handle demolition debris, litter, concrete wash out, contaminated soils, and sludge and septage.

Under 40 CFR 122.34(b)(4)(i)(D) the MS4 permit must require the permittee to develop, “Procedures for site plan review which incorporate consideration for potential water quality impacts.” New Jersey Municipal Land Use law requires input by the public on the proposed site plan through the planning boards and public hearing process. In addition, the Department's Construction Activity Permit described above, is the water quality control document associated with construction activity.

Under 40 CFR 122.34(b)(4)(i)(F) the MS4 permit must require the permittee to develop, “Procedures for site inspection and enforcement of control measures.” Construction operators are required to obtain a Soil Erosion and Sediment Control Plan in addition to the required 5G3 permit for their construction sites. These sites are subject to investigations by members of the local Soil Conservation District officials and Water Compliance and Enforcement officers from the Department. Notices of Violations can be issued up to and including stop work orders by the Soil Conservation officers and penalties issued by the Department.

In summary, the Department maintains that the Construction Activity Permit ensures that stormwater from construction activity is appropriately controlled as one of the six minimum measures as required by federal regulations. Although the Construction Activity Permit is referenced in the Tier A MS4 NJPDES permit, the permit conditions are housed in a separate regulatory document and the permit serves to coordinate the requirements of the Department of Agriculture and State Soil Conservation districts.

No changes have been made to the final permits as a result of this comment.

104. **Comment:** Regarding Part IV.B.3.a, Commenter 33 questions that since a municipality largely approves all or the vast majority of construction activities within their boundaries by an assortment of rules, regulation, laws, ordinances, etc., shouldn't the municipality have some responsibility to monitor and report on construction site stormwater? Commenter 33 states that this is particularly important when they are required to enforce storm water management program(s) of post-construction runoff. [33]

Response 104: As described in **Response 102-103**, the construction operator is responsible for implementing the Construction Activity Permit conditions. Enforcement of this permit is determined by the Soil Conservation Districts in conjunction with the Department's Water Compliance and Enforcement program. New Jersey has local Soil Conservation districts that have expertise in these matters.

No changes have been made to the final permits as a result of this comment.

Part IV.B, SBRs and Associated Conditions

4. Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment; Attachments C and D (Tier A MS4 NJPDES Permit)
2. Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment; Attachments C, D and E (Tier B MS4 NJPDES Permit)

105. **Comment:** Commenter 15 states that, as described in the 2014 petition (as referenced in **Comment 1**), the post-construction stormwater management standards in the current 2009 Tier A MS4 NJPDES permit fail to meet the MEP standard, and those standards remain unchanged in the draft permit. Part IV.B.4 continues to cross reference standards established in state regulations and the draft permit does improve on the 2009 Tier A MS4 NJPDES permit by expanding the types of sites to which the standards must apply. Specifically, the 2009 Tier A MS4 NJPDES permit required MS4s to apply the standards to “non-residential development and redevelopment projects” only, with residential projects that are not preempted by the Residential Site Improvement Standards (RSIS) included only “where necessary to implement the municipal stormwater management plan.” In contrast, the draft permit now specifies that residential projects not preempted by the RSIS must always be included as a minimum element of municipal post-construction ordinances.

Commenter 15 states that the size threshold for sites subject to the standard remains the same (1 acre) and explains that the state regulations for municipal stormwater ordinances also incorporate design standards for erosion control, groundwater recharge, stormwater runoff quantity, and stormwater runoff quality (N.J.A.C. 7:8-1.2, 7:8-5). Under these standards, development projects must achieve groundwater recharge equivalent to average annual pre-construction groundwater recharge for the site; must meet sediment removal requirements; and must not cause any increase in peak runoff rates from pre-construction conditions (N.J.A.C. 7:8-5.4). In the case of redevelopment projects where considerable impervious surface coverage already existed, this standard requires no reduction in the quantity of runoff from the redeveloped site. The regulations allow municipalities to grant exemptions and waivers from the standards (N.J.A.C. 7:8-4.6), and waive the groundwater recharge standard entirely for sites located within the “urban redevelopment area.” (N.J.A.C. 7:8-5.4(a)(2)(iii))

Commenter 15 provides specific examples of concerns with Part IV.B.4:

- These requirements fall short of the pollution reduction that is currently practicable using today’s technologies. Many jurisdictions around the country have demonstrated the feasibility of implementing requirements for the on-site retention of stormwater beyond the “pre-construction” recharge volume. The National Research Council (NRC) has recommended that stormwater management efforts focus on maintaining at least the pre-development hydrology of a site, namely that the natural conditions that existed prior to any development occurring there, as opposed to the conditions that existed prior to the specific construction project at issue. (National Research Council, Urban Stormwater

Management in the United States at 119 (2009). Pre-construction conditions may not be sufficient to prevent water quality degradation and are, by definition, never sufficient to restore water quality in a watershed that is already impaired by stormwater. In many cases, replicating pre-development hydrology may not even be sufficient to protect water quality, because even if the post-development runoff volume is the same, it will carry more pollutants than the same amount of runoff from undeveloped land in a natural state. The NRC emphasizes this focus on reducing runoff volumes due to the “water degradation resulting from the increased volume as well as increased pollutant loadings in stormwater runoff.” Because greater runoff volumes lead to more pollution, reducing stormwater runoff by retaining it on-site can dramatically reduce the pollutant loads from development. In fact, the NRC recommends that stormwater flow be used as a regulatory proxy for the loading of pollutants.

- The NRC advocates the use of controls that restore or maintain pre-development hydrology rather than those that simply avoid increases in peak runoff rates, as required by New Jersey regulations. As the NRC has stated, “effective hydrologic mitigation for urban development cannot just aim to reduce post-development peak flows to predevelopment peak flows.” (National Research Council, Urban Stormwater Management in the United States at 6 (2009)). This is because reducing peak discharge leaves the underlying increase in runoff volumes untouched, which “partly explains why evaluation of downstream conditions commonly document little improvement resulting from traditional flow-mitigation measures.” (See *id.* at 33). Additionally, controlling volume has been shown to be more effective than relying on runoff quality standards like those in the Department’s regulations. This is because “the constituents remaining even in ‘treated’ stormwater represent a substantial, but largely unappreciated, impact to downstream watercourses,” (See *id.* at 25) and because “flow is itself responsible for additional erosion and sedimentation that adversely impacts surface water quality.” (See *id.* at 99). Not only are runoff quality standards inadequately protective of water quality generally, the Department’s specific runoff quality standards are deficient because the quality standards contain narrative standards for nutrients – rather than the “measurable” and “quantifiable” standards that EPA has stated should be included in MS4 permits (EPA, MS4 Permit Improvement Guide at 5-6) and do not contain any standards for other urban stormwater pollutants that harm water quality, such as lead, copper, zinc, sediment, chemical oxygen demand, and biological oxygen demand. (Robert Pitt, The National Stormwater Quality Database, Version 3.1 (2011)).

Recognizing that additional benefits can be achieved by retention, a number of small MS4 general permits around the country include post-construction retention standards. The plain meaning of the phrase “maximum extent practicable” dictates that, if a permit in another state includes a pollution control requirement that achieves greater pollution reduction than what New Jersey requires, the Department must either adopt that more effective requirement or explain why such requirement would not be “practicable” in New Jersey. This interpretation of the MEP standard is consistent with judicial interpretations of other regulatory standards using the phrase “maximum extent practicable” or similar comparative words such as “best.” (See *Southwest Center for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118, 1157-58 (S.D. Cal. 2006) (ruling

that a permittee-developed plan subject to the Endangered Species Act's requirement to minimize harm "to the maximum extent practicable" would not meet the standard if there was another alternative that would have provided "...more mitigation or caused less harm to the endangered species and ... the rejected alternative was in fact feasible..."); see also *NRDC v. U.S. EPA*, 808 F.3d 556, 570 (2d Cir. 2015) (holding that EPA could not make a required determination, under the Clean Water Act, that permit terms were based on the "best technology economically achievable" where the agency did not "adequately explain[] why standards higher than the [standard in the permit] should not be used given available technology," and agreeing with petitioners that "EPA should have first considered what 'available' technology was capable of achieving, and then created standards based on that capability")). [15]

Response 105: The Department disagrees with these comments and maintains that the requirements at Part IV.B.4 are appropriate and meet the MEP standard. As required by 40 CFR 122.34(b)(5), Part IV.B.4 of the Tier A MS4 NJPDES permit has implemented a post-construction program:

"to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale"

40 CFR 122.34(b)(5)(B) requires small MS4 permits to address stormwater runoff from new development and redevelopment by requiring permittees to use "an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law." To implement this federal requirement, Part IV.B.4.g of the Tier A MS4 NJPDES permit requires municipalities to adopt, implement, and enforce a Stormwater Control Ordinance in accordance with the Stormwater Management rules at N.J.A.C. 7:8 et seq. and RSIS at N.J.A.C. 5:21-7 et seq.

40 CFR 122.34 states that the requirements of the permit must be expressed in "clear, specific, and measurable terms" to reduce the discharge of pollutants from the MS4 to the "maximum extent practicable (MEP)," and that "implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements..." will meet the MEP standard. The design and performance standards for water quality, water quantity, and groundwater recharge set forth in the Stormwater Management rules and incorporated by the RSIS specify methodologies, BMPs, required reductions, design standards, and maintenance requirements. These standards all meet the requirement to be expressed in clear, specific, and measurable terms. Also, nothing in the Stormwater Management rules, RSIS, or Tier A MS4 NJPDES permit prevents municipalities from adopting more stringent, alternative requirements in municipal ordinances. A municipality may adopt an ordinance requiring retention² of

² Commenter 15 points to the NRC document as recommending maintaining predevelopment conditions as the "natural conditions that existed prior to any development occurring there." However, the NRC document in question defines "predevelopment conditions" as "[t]hose conditions that existed at a site just prior to the development in question, which are not necessarily pristine conditions." NRC, *Urban Stormwater*, p. 571, Appx. B. EPA has also stated that "Predevelopment refers to runoff conditions that exist onsite immediately before the planned development

stormwater runoff on-site or setting a lower threshold to trigger the post-construction program or stormwater management requirements.

The comment states that “[T]he plain meaning of the phrase “maximum extent practicable” dictates that, if a permit in another state includes a pollution control requirement that achieves greater pollution reduction than what New Jersey requires, the Department must either adopt that more effective requirement or explain why such requirement would not be “practicable” in New Jersey.”³ However, each state “possesses the discretion and expertise to make in furtherance of its responsibilities . . . to regulate stormwater discharges from small MS4s.” *Matter of Nat. Res. Def. Council, Inc. v. N.Y. State Dep’t of Envtl. Conservation*, 34 N.E.3d 782, 796 (N.Y. 2015). As stated in the MS4 General Permit Remand Rule, it is not “necessary to expressly require the rule to compel permitting authorities to consider the terms and conditions of permits in other jurisdictions in determining the need to modify their own permits.” 81 FR at 89338-89339. The federal rules do not require all states to have a uniform approach and standards in their MS4 permits or for one permitting authority to consider every single approach used by other states. Thus, the Department is not required to adopt other states’ conditions and terms in the Tier A MS4 NJPDES permits.

Although Part IV.B.4.h of the Tier A MS4 NJPDES permit allows municipalities to grant a variance or exemption from the design and performance standards, the municipality must have an adopted mitigation plan included in the Municipal Stormwater Management Plan. A municipality’s mitigation plan must identify measures that are necessary to offset the deficit created by granting the variance or exemption and can be provided through a menu of design and performance standards with corresponding mitigation projects for different drainage areas within the municipality. The municipality must submit a written report to the county review agency and the Department describing the variance or exemption and the required mitigation within 30 days after granting a variance or exemption. Therefore, the Department maintains that the

activities occur. Pre-development is not intended to be interpreted as that period before any human-induced land disturbance activity has occurred.” 64 FR at 68761.

3 The cases cited by commenter 15 are inapplicable to the “maximum extent practicable” standard for MS4 permits. Southwest Ctr. for Biological Diversity, concerns Section 10 of the Endangered Species Act (ESA) which allows permit issuance for the take of a certain number of protected species provided certain conditions are met, one of those possible conditions being that the permit applicant demonstrates that it will “to the maximum extent practicable, minimize and mitigate the impacts of such taking.” 16 U.S.C. § 1539(a)(2)(B)(ii). Under the ESA, the permit applicant will have submitted a plan containing “alternative actions to such taking the applicant considered.” In the context of the ESA, the universe of alternatives for a permit applicant will be limited. In contrast, in the context of MS4 permits, numerous combinations of stormwater management measures could serve as the appropriate method of reducing stormwater discharge to the maximum extent practicable. The commenter hones in on a control measure that will achieve a particular standard but the “applicable law does not impose a specific performance standard on MS4s.” MD Dep’t of the Env’t v. Riverkeeper, 134 A.3d 892, 123 (Md. 2016). As to NRDC v. EPA, there the court applied the “best available technology economically achievable” standard in 33 U.S.C. § 1311 to pollution controls on ballast water discharge. However, 33 U.S.C. § 1311 standards do not apply to municipal stormwater discharge. Defenders of Wildlife v. Browner, 191 F.3d 1159, 1164-66 (9th Cir. 1999). Instead, the “maximum extent practicable” standard of 33 U.S.C. § 1342(p)(3)(B)(iii) applies. EPA “has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting” and “envisions” the “consider[ation] of such factors as conditions of receiving waters, specific local concerns, . . . MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance.” 64 FR at 68754.

mitigation requirement in Part IV.B.4.h of the Tier A MS4 NJPDES permit is clear, specific, and measurable and meets the federal requirement to reduce the discharge of pollutants to the maximum extent practicable.

The Department disagrees that the narrative standard for nutrient removal is deficient. In the adoption of MS4 General Permit Remand Rule, EPA clarified that:

“effluent limitations may be in the form of BMPs, and provided non-exclusive examples of how these BMP requirements may appear in the permit, such as in the form of specific tasks, BMP design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and the frequency of actions.” (81 FR 89320, 89334).

Moreover, the Department’s NJPDES rules at N.J.A.C. 7:14A-12.1(b)1.i has excluded “[a]ny discharge of stormwater authorized by a general permit . . . unless such general permit provides otherwise.” N.J.A.C. 7-14A-25.6(a)1 also states that:

“Best management practice (BMP) requirements are generally the most appropriate form of effluent limitations Implementation of BMPs . . . constitutes compliance with the standard of reducing pollutants to the maximum extent practicable.”

The Department’s Stormwater Best Management Practices Manual lists BMPs that are capable of nutrient control, such as bioretention systems and subsurface gravel wetlands. Therefore, applicable BMPs are available for permittees to use to address nutrient issues.

The Stormwater Management rules at N.J.A.C. 7:8-5.4(a)2ii exempt urban redevelopment areas from the groundwater recharge requirement; however, urban redevelopment areas only include those portions of a site that have been previously developed. Previously developed areas are those portions of a site covered by paved, gravel or dirt driveways; streets; roads and parking areas; impervious surfaces; lawns or structures. Areas that simply have been cleared of vegetation are not considered "previously developed" if woody vegetation has been reestablished.

The comments also address the water quality, water quantity, and groundwater recharge design and performance standards set forth in the Stormwater Management rules. 40 CFR §122.34(b)(5)(B) requires the permit to address the post-construction program by using “an ordinance or other regulatory mechanism . . . to the extent allowable under State, Tribal or local law.” In the case of New Jersey, this would require permittees to address post-construction stormwater runoff to the extent allowable under current Stormwater Management rules.

As acknowledged by the commenter, the Department is planning to propose amendments to the Stormwater Management rules. The Department will continue this regulatory process to review the current standards. The Department is also in the process of developing and updating the New Jersey Stormwater Best Management Practices Manual, maintenance guidance, and the Tier A and Tier B Municipal Stormwater Guidance Documents. The Department maintains that proper implementation of the current post-construction stormwater requirements will be aided by

these efforts and that the post-construction program required by the Tier A MS4 NJPDES permit meets the federal requirements to reduce the discharge of pollutants to the MEP.

No changes have been made to the final permits as a result of this comment.

106. **Comment:** Regarding Part IV.B.4, Commenter 15 states that many jurisdictions have demonstrated the practicability of applying post-construction requirements to sites that disturb less than 1 acre of land where at least two municipalities within New Jersey set a lower threshold. The Borough of Hightstown applies its stormwater ordinance to projects disturbing 1,000 square feet or more of soil, or the construction or redevelopment of 250 square feet or more of impervious surface (Borough of Hightstown, Ordinance 2012-12); the Township of Bernards applies its ordinance to projects in excess of 1,000 square feet or more of new impervious surface, as well as projects that disturb in excess of 2,500 square feet of land. (Bernards Township, Stormwater Management Ordinance). While Commenter 15 appreciates that the draft permit provides for the option of applying the standards to smaller sites (directing MS4s to “address stormwater runoff from the following types of major development unless a more stringent standard is specified by the municipality’s stormwater control ordinance” at Part IV.B.4.b), but Commenter 15 believes that the threshold should be lowered universally throughout the state because doing so would be practicable and result in greater pollution control.

Commenter 15 also believes that a retention standard should be applied to all residential sites, including those to which the RSIS apply. The permit assumes that residential standards “preempted” by the RSIS cannot be held to any other standard, but the RSIS regulations specifically state that the Department has the authority to impose different, more stringent standards through the terms of a permit (N.J.A.C. 5:21-1.5(b)). [15]

107. **Comment:** Commenter 6 states that requirements in state regulations that pertain to development and redevelopment are out of date and should be modernized for different tiers of development. Commenter 6 suggests that the regulations be revised so that future development of less than one acre is considered. Commenter 6 states that the town of Millburn uses a low threshold by regulating disturbances with a building permit for any area of 200 square feet and greater. Commenter 6 suggests that lower thresholds be set in other towns. [6]

Response 106-107: Both N.J.A.C. 7:8 and 40 CFR 122.34(b)(5) set forth minimum requirements for stormwater management and the RSIS incorporates N.J.A.C. 7:8 by reference. However, a municipality may adopt a stormwater control ordinance that defines major development subject to more stringent requirements than set forth in the referenced rules. The Department maintains that the governing regulations regarding this requirement are under the purview of the municipality and it would be inappropriate for the Department to mandate a statewide change.

No changes have been made to the final permits as a result of these comments.

108. **Comment:** Commenter 15 states that the New Jersey state regulations cross-referenced in the permit at Part IV.B.4 were finalized in 2004 and their requirements are vastly out-of-date. The Department acknowledged in late 2014 that they need to be updated by initiating rulemaking

efforts with the express goal of strengthening the rules and adopting new standards based on the reduction of stormwater volume through the reduction of effective impervious cover. That rulemaking has apparently stalled and Commenter 15 asserts that the Tier A MS4 NJPDES permit will fail to meet the MEP standard when issued if the regulations are not updated to include a post-construction retention standard. Commenter 15 states that this standard should require on-site retention of the water quality design volume, using any combination of infiltration, evapotranspiration, and rainwater harvesting, and should apply to both small and large sites. Commenter 15 states that this is what EPA recommended in its 2014 review of the current permit:

“EPA recommends a more stringent post-construction standard which lowers the applicability threshold (i.e. 5,000 square feet of created or replaced impervious surface for new or redevelopment) and requires on-site retention of 85th percentile storm events through infiltration, evapotranspiration, and rainwater harvesting. For projects that cannot meet 100 percent of the retention requirements (which must be documented), the remainder must be treated prior to discharge with measures have been determined to be of equal water quality value or which remove 80 percent of TSS from the same quantity of runoff. Stormwater impacts from developed sites can be reduced by using stormwater management practices often referred to as ‘green infrastructure’ or ‘low impact development’ practices that retain water on-site and mimic the natural hydrology.” (EPA Permit Review at 12).

Commenter 15 continues by stating that the fact that New Jersey regulations at N.J.A.C. 7:14A-25.6(a)(1) state that compliance with the existing, insufficient stormwater management requirements constitutes compliance with the MEP standard does not make it true. Commenter 15 contends that States may not adopt or enforce any effluent limitation or standard of performance that is less stringent than required by the federal Clean Water Act. (33 U.S.C. 1370). If state regulations fall short of the federal MEP standard, then the Department must incorporate additional, stronger requirements into the permit in order to make sure that permittees are reducing their pollutant discharges to the maximum extent practicable. [15]

Response 108: Concerns or comments regarding the content or timing of regulations referenced in Part IV.B.4 are outside the scope of the NJPDES MS4 renewal process. Any adoption or readoption of regulations are subject to a separate public process.

No changes have been made to the final permits as a result of these comments.

109. **Comment:** Commenter 22 states that N.J.A.C. 7:14A-25.6(b)3.i, 40 CFR 122.34(b)(5)(i), and Part I.F.3.a of the 2009 Tier A MS4 NJPDES permit expressly limit the scope of the entire required post construction stormwater management program to certain new development and redevelopment projects that disturb one acre or more (including projects less than one acre that are part of a larger common plan of development or sale). In the draft Tier A MS4 NJPDES renewal, this acreage disturbance threshold is incorporated in the Notes and Definitions Part IV.B.1.h definition of “major development.” In contrast, Part IV.B.4 and related language in Part IV.C.1 and Attachment C set forth no consistent and clear acreage disturbance threshold,

and in places conflict with N.J.A.C. 7:14A-25.6(b)3.i, 40 CFR 122.34(b)(5)(i), and N.J.A.C. 7:8-4.2(a).

Commenter 22 continues by stating that Part IV.B.4 must be rewritten so that it applies to all of Part IV and so that it sets forth at its outset a “disturb one acre or more” threshold (including projects less than one acre that are part of a larger common plan of development or sale that disturbs one acre or more). This threshold can be set forth expressly or via the definition of “major development” in the Notes and Definitions section. The Department should not make Part IV.B.4 harder than necessary to understand by establishing a “disturb one acre or more” threshold that applies to some Part IV.B.4 provisions, but not to others; or that uses the term “major development” in some Part IV.B.4 provisions, but not in others where it would be equally applicable. If the Department does not rewrite Part IV.B.4 then the Department needs to clarify in Part IV.B.4.b that “a more stringent standard” means that more projects satisfy Part IV.B.4.b.

More fundamentally, Commenter 22 states that any Part IV.B.4 provision that requires a Tier A Municipality to apply any post construction stormwater management requirement in N.J.A.C. 7:14A-25.6(b)3 to any new development or redevelopment projects that do not meet the “disturb one acre or more” threshold does not “set forth in more detail” (see N.J.A.C. 7:14A-25.6(a)) the SBR for “Post-Construction Stormwater Management in New Development and Redevelopment” in N.J.A.C. 7:14A-25.6(b)3. Nor is such a provision an “other ... control measure” authorized by N.J.A.C. 7:14A-25.6(a). Instead, Commenter 22 states that such a provision is a modification of this SBR that would be lawful only if accomplished through an “additional measure” adopted under N.J.A.C. 7:14A-25.6(e). Phrased another way, if the Department is unhappy with the “disturb one acre or more” threshold in N.J.A.C. 7:14A-25.6(b)3, the Department’s only proper remedy is to remove this threshold by changing N.J.A.C. 7:14A-25.6(b)3.

Commenter 22 continues with comments on specific permit conditions that are related to this issue:

- Part IV.B.4.a does not use the “disturb one acre or more” or “major development” criterion. Due to the references in Part IV.B.4.a to N.J.A.C. 7:8, it is possible that Part IV.B.4.a applies solely to “projects that ultimately disturb one or more acres of land” (the criterion in N.J.A.C. 7:8-4.2(a)). However, the following opening words in Part IV.B.4.a might apply to all new development and redevelopment: “The Tier A Municipality shall develop, update, implement and enforce its stormwater management program to address post construction stormwater runoff in new development and redevelopment...” Ambiguity in this regard is unacceptable.
- Part IV.B.4.d does not use the “disturb one acre or more” or “major development” criterion, or reference N.J.A.C. 7:8. Therefore, Part IV.B.4.d appears to require the Tier A Municipality to “review and analyze” all development applications for compliance with Part IV.B.4 (with no acreage disturbance threshold).
- Neither Part IV.B.4.j or the Part IV.C.1 provisions use the “disturb one acre or more” or “major development” criterion; or do the provisions reference N.J.A.C. 7:8. Therefore, Part

IV.B.4.j appears to require the Tier A Municipality to “ensure adequate long-term cleaning, operation and maintenance of stormwater management measures” in all new development and redevelopment projects (with no acreage disturbance threshold). Ambiguity in this regard is unacceptable. [22]

Response 109: The Department believes that the commenter’s objections to the various subsections of Part IV.B.4 is due in part to a misunderstanding of the new format as included in the Tier A MS4 NJPDES permit. The Tier A MS4 NJPDES permit was created with Notes and Definitions section in front of the permit conditions where the definitions are applicable to all permit conditions. Additionally, inclusion of this separate section of Notes and Definition at the beginning of Part IV of the Tier A MS4 NJPDES permit was intended to provide clear and helpful references and to establish a lexicon of terms in a convenient and prominent location. This is consistent with the intent of the MS4 General Permit Remand Rule as described at 81 FR 237, Dec. 9, 2016, 89320 where the final rule “..establishes two alternative approaches a permitting authority can use to issue National Pollutant Discharge Elimination (NPDES) general permits for small MS4s.” The rule also states:

“The first option is to establish all necessary permit terms and conditions to require the MS4 operator to reduce the discharge of pollutants from its MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act (“MS4 permit standard”) upfront in one comprehensive permit.”

As stated on page 1 of the Tier A MS4 NJPDES permit Fact Sheet, the Department proposed a comprehensive permit under the federal MS4 rules (40 CFR 122.28(d)). Therefore, the minimum standards for post construction stormwater management in new development and redevelopment established in Part IV.B.4 of the Tier A MS4 NJPDES permit are **all equally** applicable to the permittee.

Note that “major development” is defined in Notes and Definitions in Part IV.B.1.h of the Tier A MS4 NJPDES permit as follows:

“h. Major development” means any development that provides for ultimately disturbing one or more acres of land and any additional development defined as “major development” by a municipality’s stormwater control ordinance. Disturbance is the placement of impervious surface or exposure and/or movement of soil or bedrock or clearing, cutting, or removing of vegetation. Projects undertaken by any government agency which otherwise meet the definition of “major development” but which do not require approval under the Municipal Land Use Law, N.J.S.A. 40:55D-1et seq., are also considered “major development.”

Additionally, Part IV.B.4.b is stated as follows:

“b. The post construction stormwater management program established by the Tier A Municipality shall address stormwater runoff from the following types of major development unless a more stringent standard is specified by the municipality’s stormwater control ordinance:

- i. New development and redevelopment projects that disturb one acre or more and are not operated by the municipality (e.g. retail stores, residential complexes);
- ii. New development and redevelopment projects that disturb one acre or more and are operated by the municipality itself (e.g. town complex); and
- iii. All new development and redevelopment projects that disturb less than one acre and are part of a larger common plan of development or sale (e.g. phased residential development) that ultimately disturbs more than one acre.”

While the definition of “major development” applies to Part IV.B.4, the Department affirms that the language in Part IV.B.4.b that includes the identification of the types of major development, which the post construction stormwater management program must address, serves to provide greater clarity as to municipal ownership, operational and phased construction status. More importantly, this minimum standard (or SBR) affords a municipality the ability to establish a more stringent standard than the one acre threshold identified in the 2009 Tier A MS4 NJPDES permit. Examples of a more stringent standard include establishing a smaller area as the threshold for major development and requiring a compliance with stormwater standards based on criteria other than area of disturbance. Therefore, the Tier A MS4 NJPDES permit is consistent with the iterative progress principle discussed in the MS4 General Permit Remand Rule at 81 FR 237, Dec. 9, 2016 at 89338.

However, while the Department disagrees that Part IV.B.4.b needs to be rewritten, the Department does agree that Part IV.B.4.b could be clarified to better communicate this intent described above. As such, Part IV.B.4.b is revised as follows:

- “b. The post construction stormwater management program established by the Tier A Municipality shall address stormwater runoff from the following types of major development ~~unless a more stringent standard is specified by the~~ any additional development is defined as “major development” by a more stringent standard is specified by the municipality’s stormwater control ordinance:”

The Department does not agree with the assertion in this comment that the Department can not set forth detail in an SBR unless it is an Additional Measure. As discussed on page 37 of the Fact Sheet and pursuant to N.J.A.C. 7:14A-25.6(a), SBRs “may be set forth in more detail in the NJPDES permit” and the stormwater program “shall also include . . . other control or evaluation measures specified in the NJPDES permit.” Consistent with the provisions of N.J.A.C. 7:14A-25.6 and contrary to this comment, N.J.A.C. 7:14A-25.6(f) provides the Department with the capability to include permit conditions other than the rule’s SBRs by means other than Additional Measures or a rule change.

Responses to specific concerns as raised in this comment that relate to this issue are as follows:

- The Department asserts Part IV.B.4.a is not ambiguous because the sole purpose of Part IV.B.4.a is to describe/prescribe the nature of what the Tier A Municipality must do to address post construction stormwater runoff in new development and redevelopment and to ensure compliance with the Stormwater Management rules at N.J.A.C. 7:8.
- The Department further asserts that the main purpose of Part IV.B.4.d (where an excerpt is provided in **Response 115-116**) is to remove any ambiguity regarding the necessity of municipal reviews by a Tier A Municipality when Department review for a similar permit is also required. The limited scope for said municipal reviews is identified in Part IV.B.4.b as being whatever the municipality identifies as major development in its stormwater control ordinance.
- The requirements of Part IV.B.4.j when read in context with the rest of Part IV.B.4 and the definition at Part IV.B.1.h sufficiently outlines the requirement. The Department maintains that Part IV.B.4.j and Part IV.C.1, are appropriate as written and that there is no need to reference the “disturb one acre or more” or “major development” criterion, or reference N.J.A.C. 7:8 as suggested in this comment.

This change affects Part IV.B.4.b of the final permit.

110. **Comment:** Commenter 22 states that N.J.A.C. 7:14A-25.6(b)3.i and 25.8(e)1 and Part I.F.2.a of the 2009 Tier B MS4 NJPDES permit expressly limit the scope of the entire required post construction stormwater management program to certain new development and redevelopment projects that disturb one acre or more (including projects less than one acre that are part of a larger common plan of development or sale). In the draft Tier B MS4 NJPDES permit, this acreage disturbance threshold is incorporated in the Notes and Definitions Part IV.B.1.g definition of “major development.” In contrast, Part IV.B.2 and related language in Attachment C and Attachment E set forth no consistent and clear acreage disturbance threshold, and in places conflict with N.J.A.C. 7:14A-25.6(b)3i and 25.8(e)1 and N.J.A.C. 7:8-4.2(a).

Commenter 22 continues by stating that Part IV.B.2 must be rewritten so that it applies to all of Part IV.B.2 and so that it sets forth at its outset a “disturb one acre or more” threshold (including projects less than one acre that are part of a larger common plan of development or sale that disturbs one acre or more). This threshold can be set forth expressly or via the definition of “major development” in the Notes and Definitions section. The Department should not make Part IV.B.2 harder than necessary to understand by establishing a “disturb one acre or more” threshold that applies to some Part IV.B.2 provisions, but not to others; or that uses the term “major development” in some Part IV.B.2 provisions, but not in others where it would be equally applicable. If the Department does not rewrite Part IV.B.2 then the Department needs to clarify in Part IV.B.2.b that “a more stringent standard” means that more projects satisfy Part IV.B.2.b.

More fundamentally, Commenter 22 states that any Part IV.B.2 and Attachment E provision that requires a Tier B Municipality to apply any post construction stormwater management requirement in N.J.A.C. 7:14A-25.6(b)3 to any new development or redevelopment projects that do not meet the “disturb one acre or more” threshold does not “set forth in more detail” (see

N.J.A.C. 7:14A-25.8(c)) the SBR for “Post-Construction Stormwater Management in New Development and Redevelopment.” Nor is such a provision an “other ... control measure” authorized by N.J.A.C. 7:14A-25.8(e). Instead, Commenter 22 states that such a provision is a modification of this SBR that would be lawful only if accomplished through an “additional measure” adopted under N.J.A.C. 7:14A-25.6(e). Phrased another way, if the Department is unhappy with the “disturb one acre or more” threshold in N.J.A.C. 7:14A-25.6(b)3, the Department’s only proper remedy is to remove this threshold by changing N.J.A.C. 7:14A-25.6(b)3. [22]

Response 110: The same reasons as described above for the Tier A MS4 NJPDES permit apply to the Tier B MS4 NJPDES permit. While the Department disagrees that Part IV.B.2.b needs to be rewritten, the Department does agree that Part IV.B.2.b could be clarified to better communicate this intent described above. As such, Part IV.B.2.b.is revised as follows:

“b. The post construction stormwater management program established by the Tier B Municipality shall address stormwater runoff from the following types of major development ~~unless a more stringent standard is specified by the~~ any additional development is defined as “major development” by a municipality’s stormwater control ordinance.”

This change affects Part IV.B.2.b of the final permit.

111. **Comment:** Commenter 22 states that Section 7.A.4 of the Fact Sheet for the Tier A MS4 NJPDES permit did not directly mention the elimination in Part IV.B.4 of the language in Part I.F.3.a of the current 2009 Tier A Permit that expressly limits the scope of the entire required post construction stormwater management program to certain new development and redevelopment projects that disturb one acre or more. Because the “disturb one acre or more” threshold is an integral part of the post construction stormwater management requirement in N.J.A.C. 7:14A-25.6(b)3i and 40 CFR 122.34(b)(5)(i) and is also in N.J.A.C. 7:8-4.2(a), this change to the current Tier A MS4 NJPDES permit is a significant change that should have been expressly mentioned and justified in the Fact Sheet as required by N.J.A.C. 7:14A-15.8(c). [22]

Response 111: The Department agree with the portion of this comment that the “disturb one acre or more” threshold is an integral part of the post-construction stormwater management requirement. However, the Department asserts that this limit has not been relaxed. Section 7.A.4 of the Fact Sheet for the Tier A MS4 NJPDES permit presents the post-construction permit requirements in detail and clearly presents the definition of “major development,” which is found in the permit’s Notes and Definitions section at Part IV.B.1.h. As for the claim that there was no mention of area limits, Page 19 of the Fact Sheet states:

“The post construction stormwater management program established by the Tier A Municipality shall address stormwater runoff from the following types of major development unless a more stringent standard is specified by the municipality’s stormwater control ordinance...”

This is consistent with the definition found in the permit's Notes and Definitions Part IV.B.1.h. This "more stringent standard" corresponds to the "any additional development defined as "major development"" language in the aforementioned definition and in permit Part IV.B.4.b as revised in the final permit (see **Response 109**). Therefore, the Fact Sheet does reflect the opportunity for a municipality to establish a tighter areal limit for major development, so long as this limit is included in the municipality's stormwater control ordinance as per Part IV.B.4.b of the Tier A MS4 NJPDES permit, which thereby meets the requirements for disclosure established in N.J.A.C. 7:14A-15 *et seq.* Additionally, this allowance is consistent with the iterative progress principle discussed in **Response 109**. Finally, tighter local standards are not incorporated into a municipal post-construction stormwater management program until a municipality elects to codify this stricter standard into its municipal stormwater control ordinance. In sum, the Department maintains that the Fact Sheet is appropriate as written as in conformance with N.J.A.C. 7:14A-15.8(c).

No changes have been made to the final permits as a result of this comment.

112. **Comment:** Commenter 22 states that Section 7.B.2 of the Fact Sheet for the Tier B MS4 NJPDES permit did not directly mention, the elimination in Part IV.B.2 of the language in Part I.F.2.a of the current 2009 Tier B MS4 NJPDES permit that expressly limits the scope of the entire required post construction stormwater management program to certain new development and redevelopment projects that disturb one acre or more. Because the "disturb one acre or more" threshold is an integral part of the post construction stormwater management requirement in N.J.A.C. 7:14A-25.6(b)3i and 25.8(e)1 and also in N.J.A.C. 7:8-4.2(a), this change to the current Tier B MS4 NJPDES permit is a significant change that should been expressly mentioned and justified in the Fact Sheet as required by N.J.A.C. 7:14A-15.8(c). [22]

Response 112: As there is no Part 7.B.2 in the Fact Sheet for the draft Tier B MS4 NJPDES permit, the Department believes the commenter was referring to Part 7.A.2 entitled "Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment."

As described in **Response 111** for the Tier A MS4 NJPDES permit, the Department agrees with the portion of the comment that the "disturb one acre or more" threshold in an integral part of the post-construction stormwater management requirement. However, the Department asserts that this limit has not been relaxed. Section 7.A.2 of the Fact Sheet for the Tier B MS4 NJPDES permit presents the post-construction permit requirements in detail and clearly presents the definition of "major development," which is found in the permit's Notes and Definitions Part IV.B.1. As for the claim that there was no mention of area limits, page 19 of the Fact Sheet states:

"The post construction stormwater management program established by the Tier B Municipality shall address stormwater runoff from the following types of major development unless a more stringent standard is specified by the municipality's stormwater control ordinance."

This is consistent with the definition found in the permit's Notes and Definitions Part IV.B.1.g. This "more stringent standard" corresponds to the "any additional development defined as "major development"" language in the aforementioned definition and in permit Part IV.B.2.b as revised in the final permit (see **Response 111**). Therefore, the Fact Sheet does reflect the opportunity for a municipality to establish a tighter areal limit for major development, as long as this limit is included in the municipality's stormwater control ordinance, per Part IV.B.2.b of the Tier B MS4 NJPDES permit, which thereby meets the requirements for disclosure established in N.J.A.C. 7:14A-15 et seq. Additionally, this allowance is consistent with the interactive progress principle. Finally, tighter local standards are not incorporated into a municipal post-construction stormwater management program until a municipality elects to codify this stricter standard into its municipal stormwater control ordinance. In sum, the Department maintains that the Fact Sheet is appropriate as written as in conformance with N.J.A.C. 7:14A-15.8(c).

113. **Comment:** Commenter 22 states that at Part IV.B.4.b.iii and at the second bullet under "Application of Design Standard" in Attachment C, the clause "that ultimately disturbs more than one acre" must be changed to "that ultimately disturbs one acre or more." This will provide consistency with N.J.A.C. 7:14A-25.6(b)3i, 40 CFR 122.34(b)(5)(i), and N.J.A.C. 7:8-4.2(a).

Similarly, regarding the Tier B MS4 NJPDES permit, at Part IV.B.2.b.iii and at the second bullet under "Application of Design Standard" in Attachment C, the clause "that ultimately disturbs more than one acre" must be changed to "that ultimately disturbs one acre or more." This will provide consistency with N.J.A.C. 7:14A-25.6(b)3i, -25.8(e)1, and N.J.A.C. 7:8-4.2(a). [22]

Response 113: The Department agrees that Part IV.B.4.b.iii of the Tier A MS4 NJPDES permit, Part IV.B.2.b.iii of the Tier B MS4 NJPDES permit, and the second bullet of Attachment C require clarification. Part IV.B.4.b.iii of the final Tier A MS4 NJPDES permit and Part IV.B.2.b.iii of the final Tier B MS4 NJPDES permit have been revised as follows:

"iii. All new development and redevelopment projects that disturb less than one acre and are part of a larger common plan of development or sale (e.g. phased residential development) that ultimately disturbs ~~more than one acre~~ one acre or more."

Similarly, the second bulleted item in Attachment C of the final permits have been revised as follows:

- "Storm drain inlets installed as part of new development and redevelopment (public or private) that disturb less than one acre that are part of a larger common plan of development or sale (e.g. phased residential development) that ultimately disturbs ~~more than one acre~~ one acre or more;

This change affects Part IV.B.4.b.iii of the final Tier A MS4 NJPDES permit and Part IV.B.2.b.iii of the final Tier B MS4 NJPDES permit. This change also affects Attachment C of the Tier A and Tier B MS4 NJPDES permits.

114. **Comment:** Regarding Part IV.B.4, Commenter 4 states that, since the early adoption of the Storm Water Rule N.J.A.C. 7:8, it has advocated to the Department for the implementation of a Municipal Engineer Certification process and documentation form. This would serve to demonstrate that the review and approval of development and redevelopment projects within the municipality were being reviewed for compliance with the municipality's storm water management ordinance and N.J.A.C. 7:8. Commenter 4 states that this MS4 renewal is an appropriate time to implement this procedure in concert with the other documentation procedures provided in the draft MS4 NJPDES permit and the Maintenance Guidance Document.

Commenter 4 states that this documentation procedure will lead the way to the ultimate goal of having the Municipal Engineer Certification replace the Department's internal stormwater review on most applications. Additionally, this program will lead to a streamlining of the Department's Land Use Permitting process and reduce the development costs for the applicant community. Commenter 4 attaches a copy of a proposed reviewer's form to their comments. [4]

Response 114: Creation of a municipal engineer certification process is outside the scope of the Tier A and Tier B MS4 NJPDES permits. However, it is the intent of the Department for the Stormwater Management Design Review Training (Part IV.B.5.e), Municipal Board and Governing Body Member Related Training (Part IV.B.5.f), and Attachment D – Major Development Stormwater Summary (Part IV.B.4.i) of the Tier A and Tier B MS4 NJPDES permits to augment and assist with consistent municipal or contracted board engineer review for compliance with the municipality's stormwater control ordinance and N.J.A.C. 7:8.

Pursuant to N.J.A.C. 7:8 and the Tier A and Tier B MS4 NJPDES permits (consistent with N.J.A.C. 7:14A-25.6(b)3.ii), municipalities are required to review stormwater management designs for major development. To ensure appropriate review by municipal engineers, the Tier A and Tier B MS4 NJPDES permits require that, beginning on the effective date of the permit authorization, Tier A and B Municipalities shall complete new Attachment D (Major Development Stormwater Summary) for each structural and non-structural stormwater management measure (e.g. stormwater management basin, subsurface infiltration/detention system, manufactured treatment device, green infrastructure)." Please refer to **Response 133-134** for additional information regarding the purpose of Attachment D as well as a response to any suggested changes.

No changes have been made to the final permits as a result of this comment.

115. **Comment:** Regarding Part IV.B.4.d, Commenter 16 states that this section now clarifies that the municipal reviewer shall review/analyze development applications even if a separate permit is required by the Department for the same or similar activity. This requirement is at best duplicative and at worst will result in conflicting comments. Commenter 16 questions the need to have two separate agencies review stormwater for the same project, especially if the project is non-residential (i.e., not subject to the RSIS) and the applicant can demonstrate that the stormwater design is being reviewed by the Department. In these instances, a "secondary" review should be at the discretion of the municipal reviewer based on the size, scope and potential drainage impacts of the project. [16]

116. **Comment:** Commenter 3 expresses concern regarding Part IV.B.4.d. This permit condition requires Tier A Municipalities to review and analyze development applications for compliance with Part IV.B.4 (Post Construction) for the permit even if a separate permit is required by the Department for the same or similar activity. [3]

Response 115-116: The Department disagrees with these comments. Part IV.B.4.d of the Tier A MS4 NJPDES permit is stated as follows:

“d. The Tier A Municipality shall review and analyze development applications for compliance with Part IV.B.4 (Post Construction) of this permit even if a separate permit is required by the Department for the same or similar activity (e.g. a Land Use permit).”

Pursuant to the Stormwater Management rules (N.J.A.C. 7:8) and the Tier A MS4 NJPDES permit, and consistent with N.J.A.C. 7:14A-25.6(b)3.ii, municipalities are required to review stormwater management designs for major development. This obligation, however, is not new and, as pointed out by the commenter, Part IV.B.4.d merely clarifies an existing obligation.

The Stormwater Management Act, enacted in 1981, specifically mandates the municipality’s obligation to adopt stormwater control ordinances to manage the stormwater issues caused by the development projects that are approved through the municipality’s land use approval process. By law, regardless of whether the development projects will be subject to a state agency’s review for stormwater management under the state’s other regulations, municipalities are required to conduct their own review. Furthermore, municipalities may adopt stormwater control ordinances more stringent than the Stormwater Management rules. Therefore, the Department’s stormwater management review cannot be a substitution for the municipality’s stormwater management review. Practically, however, if a project has been reviewed by the Department prior to the municipality’s review, the municipality’s reviewer may consider the Department’s review comments while conducting its own review so that the municipality can leverage its time and resources. Nevertheless, municipalities must be familiar with their own stormwater control ordinances and mindful of whether these ordinances set more stringent requirements.

No changes have been made to the final permits as a result of these comments.

117. **Comment:** Regarding Part IV.B.4.f.i, Commenter 33 suggests that after the words “County review agency” the words “and the NJ Department of Environmental Protection” be added. Commenter 33 questions that since the County was assigned review and approval authority, how does someone go about verifying that a municipality has complied? Commenter 33 questions if there is a mechanism to verify what municipalities have already completed this task. [33]

Response 117: Part IV.B.4.f is stated as follows:

“f. The Tier A Municipality shall adopt, amend and implement a written Municipal Stormwater Management Plan (MSWMP), pursuant to N.J.A.C. 7:8 et seq., to describe the framework of

the Tier A Municipality's strategy, structure and process for its post construction stormwater management program.

- i. The Tier A Municipality shall submit the adopted plan for approval to the County review agency in accordance with N.J.A.C. 7:8-4;
- ii. The Tier A Municipality shall notify the Department and post the approved plan and any amendments on its website (or otherwise comply with the notification requirements of N.J.A.C. 7:8-4.4(e)) within thirty days of the effective date of the plan. See Part IV.B.1.b.iii (Public Involvement and Participation);
- iii. The Tier A Municipality shall review and update its MSWMP as necessary, and as a part of the reexamination of its municipal master plan in accordance with N.J.A.C. 7:8-4.3(c) and (d)."

The Department disagrees with the requested revision as stated in this comment since Part IV.B.4.f.ii requires the municipality to notify the Department and post the approved municipal stormwater management plan and any amendments on its website with thirty days of the effective date of the plan. This requirement is sufficient to allow the Department to verify if the municipality has met the requirements under Part IV.B.4.f.

No changes have been made to the final permits as a result of this comment.

118. **Comment:** Commenter 21 states that their county does not possess the staff or resources to complete the technical engineering review requirements for the "County review agency" under the permit. [21]

Response 118: Part IV.B.4.f of the Tier A MS4 NJPDES permit incorporates the Stormwater Management rules at N.J.A.C. 7:8 et seq. to comply with the post-construction program set forth in 40 CFR 122.34(b)(5). These regulations require small MS4 permits to address stormwater runoff from new development and redevelopment by using a municipal ordinance or other regulatory mechanism. The requirements for developing a Municipal Stormwater Management Plan, Stormwater Control Ordinance(s), and the county approval process are mandated by the Stormwater Management Act, P.L. 1981, c.32, codified as N.J.S.A. 40:55D-93 et seq., and implemented through the Stormwater Management rules. Therefore, county review agencies are required to fulfill this obligation.

No changes have been made to the final permits as a result of this comment.

119. **Comment:** Commenter 22 states that the "county review process" described in N.J.A.C. 7:8-4.4, and the closely related municipal land use law (MLUL) provision at N.J.S.A. 40:55D-97, are concerned with county review of MSWMPs and municipal stormwater control ordinances (SCOs) (including amendments thereto) after municipalities have adopted them. There are other MLUL and County Planning Act provisions that pertain to county planning board review of MSWMPs and SCOs before municipalities adopt them. Commenter 22 states that the absence,

in N.J.A.C. 7:8-4 and the initial (2004), current (2009), and draft Tier A MS4 NJPDES permit, of any acknowledgment of these statutory provisions, is a major deficiency in the Department's stormwater program. To help remedy this deficiency, Commenter 22 suggests that Part IV.B.4 acknowledge these statutory provisions. N.J.A.C. 7:8-4 must similarly be amended, but because these are statutory provisions, Part IV.B.4 can be amended whether or not N.J.A.C. 7:8-4 is amended.

Commenter 22 states that the Department previously addressed this deficiency by including relevant language on pages 28 and 29 in Chapter 4 of the NJDEP April 2004 Tier A Municipal Stormwater Guidance Document (www.nj.gov/dep/dwq/pdf/Tier_A/Chapter%204.pdf). This guidance encourages Tier A Municipalities and county review agencies to communicate with each other throughout the development of MSWMPs and SCOs. The guidance also states that:

“As required by the County Planning Act at N.J.S.A. 40:27-4 (also see N.J.S.A. 40:55D-13), the Tier A Municipality shall: Forward a copy of any proposed municipal stormwater management plan (or amendment to that plan) to the county planning board for review and report . . .”

and,

“As required by the Municipal Land Use Law at N.J.S.A. 40:55D-15.b . . . , the Tier A Municipality shall: Provide a copy of any proposed municipal stormwater control ordinance (or amendment to that ordinance) to the county planning board at least 10 days prior to the date of the public hearing held by the municipal governing body.”

Including this language in a guidance document is an adequate substitute for including this language in the Tier A MS4 NJPDES permit and N.J.A.C. 7:8-4.

N.J.S.A. 40:27-4 is applicable to MSWMPs because the MLUL provides at N.J.S.A. 40:55D-94 that the MSWMP is an “integral part” of the municipality's master plan. N.J.S.A. 40:55D-15.b is applicable to SCOs because they are “development regulations” as defined in the MLUL at N.J.S.A. 40:44D-4.

Commenter 22 states that Part IV.B.4 of the Tier A MS4 NJPDES permit must acknowledge these statutory provisions since MSWMPs and SCOs may be amended at any time even though most Tier A permittees have already adopted such. In fact, the Department has already amended N.J.A.C. 7:8 in a way that will require Tier A permittees to amend their existing MSWMPs and SCOs. Specifically, amendments to N.J.A.C. 7:8-5.5 became effective on June 20, 2016 that replaced the former “special water resources protection area” requirements in N.J.A.C. 7:8-5.5(h) with references to “300-foot riparian zone” requirements in revised Flood Hazard Area Control Act Rules (48 N.J.R. 1067(a)). Commenter 22 states that the Department has still not updated page D-13 of its own April 2004 Model Stormwater Control Ordinance for Municipalities (www.nj.gov/dep/stormwater/bmp_manual/NJ_SWBMP_D.pdf) to reflect these amendments to N.J.A.C. 7:8-5.5. The Department may further revise N.J.A.C. 7:8, and thereby trigger additional new rounds of county review.

Commenter 22 submits a similar comment on the Tier B MS4 NJPDES permit. Commenter 22 states that Part IV.B.2 of that permit must be expanded to acknowledge MLUL and County Planning provision that pertain to county planning board review of MSWMPs and municipals stormwater control ordinances before municipalities adopt them. [22]

Response 119: The Department disagrees with the assertions made in this comment that the stormwater program is deficient because a county only reviews MSWMPs and SCOs after the municipality has approved them. Part IV.B.4.f.i of the Tier A MS4 NJPDES permit requires a Tier A municipality to follow the order of the approval process, as outlined in N.J.A.C. 7:8-4.4 et seq as described in **Response 117**. This requirement is in Part IV.B.2.f.i of the Tier B MS4 NJPDES permit. In fact, it is this same statute which prevents the adopted ordinance from becoming effective until it is approved by the county review agency. It is therefore unnecessary to add the suggested language to the permit or rules.

With regard to previously made changes to N.J.A.C. 7:8, there is no mandate for Tier A or Tier B Municipalities to modify their SCOs because they still meet the minimum standards; however, a municipality may choose to do so on their own. If this is the case, the municipality is then required to seek county approval, as per Part IV.B.4.f.iii which states:

“iii. The Tier A Municipality shall review and update its MSWMP as necessary, and as a part of the reexamination of its municipal master plan in accordance with N.J.A.C. 7:8-4.3(c) and (d).”

A similar requirement is contained in Part IV.B.2.f.iii of the Tier B MS4 NJPDES permit.

No changes have been made to the final permits as a result of this comment.

120. **Comment:** Commenter 22 states that Part IV.B.4 is incomplete because it does not require the Tier A Municipality to submit its adopted MSWMP and adopted municipal stormwater control ordinance (SCO) (including adopted MSWMP and ordinance amendments) to the Pinelands Commission for examination in accordance with the Pinelands Comprehensive Management Plan rules at N.J.A.C. 7:50-3, where applicable. Commenter 22 states that MSWMPs and SCOs are, respectively, municipal master plan amendments and land use ordinances for purposes of N.J.A.C. 7:50-3.

Commenter 22 states that although N.J.A.C. 7:8-4 and the MLUL stormwater provisions at N.J.S.A. 40:55D-93 through 99 do not expressly mention the Pinelands, N.J.S.A. 40:55D-95 requires each stormwater management plan and stormwater management ordinance to “conform to all relevant federal and State statutes, rules and regulations concerning storm water management.” Additionally, N.J.A.C. 7:8-1.5(a) provides that nothing in N.J.A.C. 7:8 “shall be construed as preventing the Department or other agencies or entities [such as the Pinelands Commission] from imposing additional or more stringent stormwater management requirements necessary to implement the purposes of any enabling legislation ...” Commenter 22 states that the Pinelands Comprehensive Management Plan rules include extensive requirements concerning

stormwater management (e.g., at N.J.A.C. 7:50-6.84(a)6), and the Pinelands Commission has been certifying MSWMPs and SCOs for many years.

Commenter 22 notes the Pinelands Commission element of the following requirement in the current 2009 Tier A MS4 NJPDES permit as found in Part I.F.3.d.v of the excerpt courtesy copy of the permit language applicable to a “New Permittee.” A similar provision is found in the complete current Tier B MS4 NJPDES permit applicable to a “New Permittee”:

“Within 12 months from the adoption of the municipal stormwater management plan, Tier A Municipalities shall adopt a stormwater control ordinance(s) to implement that plan, and shall submit the adopted municipal stormwater management plan and ordinance(s) to the appropriate county review agency for approval pursuant to N.J.A.C. 7:8-4.4 (and, where N.J.A.C. 7:50-3 is applicable, to the Pinelands Commission for certification);”

In the 2009 Tier A MS4 NJPDES permit, this requirement applies only if the “new permittee” Tier A Municipality “was not previously authorized to discharge under the Tier A Municipal Stormwater General Permit on or before February 28, 2009.” However, the Department has already amended N.J.A.C. 7:8 in a way that will require Tier A permittees to amend their existing MSWMPs and SCOs, and may do so again in the future.

In the 2009 Tier B MS4 NJPDES permit, this requirement applies only if the “new permittee” Tier B Municipality is “a municipality that was not authorized to discharge under the Tier A or Tier B Municipal Stormwater General Permit on February 28, 2009, but that obtains authorization to discharge under the Tier B Municipal Stormwater General Permit after February 28, 2009.” Commenter 22 speculates that the Department’s thinking in this regard seems to have been that by 2009, there were no remaining county or Pinelands Commission review issues for existing Tier A and Tier B permittees. However, the Department may revise N.J.A.C. 7:8 in a way that will require Tier B permittees to amend their existing MSWMPs and municipal stormwater control ordinances, and thereby trigger one or more new rounds of county and Pinelands Commission review.

The Fact Sheet for the draft Tier A MS4 NJPDES permit, Section 7.A.4.b includes the statement that “where N.J.A.C. 7:50-3 is applicable, the municipal stormwater control ordinance (and any amendments) shall be certified by the Pinelands Commission.” For the Tier B MS4 NJPDES permit similar language is at Section 7.A.2.b. This certification is so important, however, that it needs to be recognized expressly in enforceable Part IV.B.4 text (Part IV.B.2 text for the Tier B MS4 NJPDES permit), not merely in a nonenforceable Fact Sheet that may be inconvenient to obtain in future years. Moreover, where N.J.A.C. 7:50-3 is applicable, it applies to the MSWMP (and any amendments), not just to the SCO. [22]

Response 120: The Department disagrees with the commenter’s statement that Part IV.B.4 is incomplete for failing to require a Tier A municipality to submit its adopted MSWMP and SCO to the Pinelands Commission for review. Neither N.J.A.C. 7:14A nor N.J.A.C. 7:8 specifically require an MSWMP or SCO to be submitted to the Pinelands Commission. Furthermore, Part II.C.4.c of the draft Tier A MS4 NJPDES permit states

“c. In accordance with N.J.A.C. 7:14A-6.2(a)7, this permit does not authorize any infringement of State or local law or regulations, including, but not limited to, N.J.A.C. 7:50 (the Pinelands rules). . .”

This is consistent with the requirement established in N.J.A.C.7-14A-6.2(a)7, which states:

“A permit shall not authorize any injury to persons or property or invasion of other private rights, or any infringement of Federal, State or local law or regulations.”

As such, the permit does not alleviate any municipality’s obligation to seek certification from the Pinelands Commission for their MSWMP or SCO, when such a certification is required.

While this comment is written with respect to Part IV.B.2 of the Tier B MS4 NJPDES permit, the issues are identical to the comment raised about Part IV.B.4 of the Tier A MS4 NJPDES permit; therefore the same response applies.

No changes have been made to the final permits as a result of this comment.

121. **Comment:** Commenter 22 states that Part IV.B.4.g incorrectly references a “sample stormwater ordinance applicable to Pinelands Area Municipalities posted at www.nj.gov/dep/stormwater/bmp_manual2.htm.” Part IV.B.4.g should instead reference the “Model Stormwater Control Ordinance for Pinelands Area Municipalities posted at www.nj.gov/dep/stormwater/pinelands.htm” which links directly to this model ordinance and is consistent with Section 7.A.4.b of Fact Sheet. Commenter 22 explains that this model ordinance is intended to be consistent with both N.J.A.C. 7:8 and the Pinelands Comprehensive Management Plan rules and was prepared jointly by the Department and the Pinelands Commission. [22]

Response 121: The Department agrees that the hyperlink for the Pinelands sample ordinance is incorrect. Part IV.B.4.g is revised as follows:

“g. In order to implement the post construction stormwater management program, the Tier A Municipality shall adopt, amend, implement and enforce a municipal stormwater control ordinance. The Tier A Municipality shall develop and adopt the contents of the ordinance in accordance with N.J.A.C. 7:8 et seq. A sample stormwater ordinance consistent with the requirements of the Stormwater Management Rules is posted at www.nj.gov/dep/stormwater/bmp_manual2.htm and a sample stormwater ordinance applicable to Pinelands Area Municipalities is posted at ~~www.nj.gov/dep/stormwater/bmp_manual2.htm~~ www.nj.gov/dep/stormwater/pinelands.htm”

This change affects Part IV.B.4.g of the Tier A MS4 NJPDES permit.

122. **Comment:** Commenter 22 states that the requirement in Part IV.B.4.g that “the Tier A Municipality shall adopt, amend, implement and enforce a municipal stormwater control

ordinance” is inadequate because it does not make clear when the adopted ordinance shall first be implemented and enforced. Due to the county review process (and, where applicable, the Pinelands Comprehensive Management Plan rules), this date may be long after the initial adoption date (see, e.g., N.J.A.C. 7:8-4.4 and N.J.S.A. 40:55D-97).

To remedy this inadequacy, Commenter 22 suggests that Part IV.B.4.g be expanded to incorporate the following requirements in Part I.F.3.c.i as included in the current 2009 Tier A MS4 NJPDES permit:

“Enforce stormwater control ordinance(s), prepared in accordance with N.J.A.C. 7:8-4, when approved by the county review agency (and, where N.J.A.C. 7:50-3 is applicable, certified by the Pinelands Commission) or shall enforce stormwater control ordinance(s) when conditionally approved by the county review agency upon adoption by the municipality of the amendments specified by the county review agency (and, where N.J.A.C. 7:50-3 is applicable, certified by the Pinelands Commission).”

Commenter 22 provides a similar comment for the Tier B MS4 NJPDES permit for Part IV.B.2.g. [22]

Response 122: The Department disagrees with the comment that Part IV.B.4.g is inadequate because it is too general regarding the initial implementation and enforcement of Stormwater Control Ordinances (SCOs). This same rationale applies to Part IV.B.2.g of the Tier B MS4 NJPDES permit which contains identical language. Part IV.B.4.g. of the Tier A MS4 NJPDES permit states:

“g. In order to implement the post construction stormwater management program, the Tier A Municipality shall adopt, amend, implement and enforce a municipal stormwater control ordinance. The Tier A Municipality shall develop and adopt the contents of the ordinance in accordance with N.J.A.C. 7:8 et seq...”

In addition, N.J.A.C 7:8-4.3(b) states:

“Within one year after the municipality adopts the municipal stormwater management plan, the municipality shall adopt stormwater control ordinance(s) to implement the adopted plan and shall submit the adopted municipal stormwater management plan and ordinance(s) to the county review agency for approval. The adopted municipal stormwater management plan and ordinance(s) shall not take effect without approval by the county review agency.”

N.J.A.C. 7:8-4.4 further describes the county review process, including N.J.A.C. 7:8-4.4(d), which states:

“A municipal stormwater management plan and ordinance(s) approved under (c) above shall take effect immediately. A municipal stormwater management plan and ordinance(s) conditionally approved under (c) above shall take effect upon adoption by the municipality of the amendments specified by the county review agency.”

Because this language is included in N.J.A.C. 7:8 and the Tier A MS4 and Tier B NJPDES permits specifically require compliance with N.J.A.C. 7:8, it is not necessary to add this language to the permit as suggested in this comment.

The 2004 Tier A and Tier B MS4 NJPDES permits required permittees to adopt a Municipal Stormwater Management Plan (MSWMP) within 12 months of the effective date of permit authorization (EDPA). Within 12 months of the adoption of the MSWMP, Tier A and Tier B Municipalities were required to adopt SCOs as a means of implementing the MSWMP. Therefore, within 24 months of the EDPA, Tier A and Tier B Municipalities were required to adopt and implement SCOs. Because Tier A and Tier B Municipalities were already required to adopt and implement SCOs, the 2009 Tier A MS4 NJPDES permit required enforcement of SCOs as of EDPA (March 1, 2009). For this same reason, the implementation schedule for meeting the post-construction requirements is EDPA, as established in Attachments A and A-1. This is reiterated on Page 1 of Attachment A, which states:

“...Where a requirement is not new and not modified...the Existing Permittee is expected to be in compliance on the Effective Date of Permit Authorization (EDPA).”

Further, Part II.B.1.a of the Tier A and Tier B MS4 NJPDES permits state:

“a. Upon reissuance of this general permit, existing authorizations shall be automatically renewed as provided by N.J.A.C. 7:14A-6.13(d)9 and 25.4(a)3 using the information provided in the permittees’ most recently submitted RFA.”

Therefore, municipalities are required to enforce any existing ordinances immediately upon EDPA.

In the event that a Tier A or Tier B Municipality updates their MSWMP or SCO, either voluntarily or as a result of new or amended legislation or regulations, the permit provides sufficient information explaining when the SCO must be enforced. Part IV.A.3.e of the Tier A MS4 NJPDES permit states:

“e. The Tier A Municipality shall modify and update its stormwater program (including applicable plans and ordinances) to conform with applicable new or amended legislation or regulations. Such modification shall be completed and effective within 12 months of written notification by the Department of the need for modification.”

Similar language is included for Tier B Municipalities at Part IV.A.3.e of the Tier B MS4 NJPDES permit. Additionally, if a municipality voluntarily updates their MSWMP, they are required under N.J.A.C. 7:8-4.3 to adopt a SCO to implement the MSWMP and submit the MSWMP and SCO to the county review agency for approval. The SCO will then take effect upon approval by the county review agency, as required under N.J.A.C. 7:8-4.4.

No changes have been made to the final permits as a result of this comment.

123. **Comment:** Commenter 22 states that Part IV.B.4.g is incomplete because it does not expressly require the Tier A Municipality to submit the adopted stormwater control ordinance (SCO) for approval to the County review agency in accordance with N.J.A.C. 7:8-4. In contrast, Commenter 22 states that Part IV.B.4.f.i does expressly require the submission of the adopted MSWMP for approval to the County review agency. Both N.J.A.C. 7:8-4.4 and N.J.S.A. 40:55D-97 require the municipality to submit both the adopted MSWMP and the adopted SCO for approval to the County review agency. In addition, Parts IV.B.4.f and 4.g are deficient because they do not set forth a deadline for the Tier A Municipality to adopt and submit to the County review agency a MSWMP or SCO that the municipality revised in response to County disapproval or conditional approval of a previously submitted MSWMP or SCO.

Commenter 22 states that the requirements that should be added to Part IV.B.4 for all Tier A permittees are those found, in the 2009 Tier A MS4 NJPDES permit, in Part I.F.3.d.v of the excerpt courtesy copy of the permit language applicable to a “New Permittee” (and in Part I.F.3.d.xii of the complete current Tier A MS4 NJPDES permit):

- If a county review agency conditionally approves the adopted municipal stormwater management plan and ordinance(s) the Tier A Municipality shall, within 180 days of the conditional approval, adopt the amendments to the municipal stormwater management plan and ordinance(s) specified by the county review agency and resubmit the amended municipal stormwater management plan and ordinance(s).
- If a county review agency disapproves the adopted municipal stormwater management plan and ordinance(s) the Tier A Municipality shall, within 180 days of the disapproval, resubmit an amended municipal stormwater management plan and ordinance(s) to the county review agency.

Commenter 22 states that in the 2009 Tier A MS4 NJPDES permit, these requirements apply only if the “new permittee” Tier A Municipality “was not previously authorized to discharge under the Tier B Municipal Stormwater General Permit on or before February 28, 2009.” When first added to this permit in 2005, these requirements applied to all Tier A permittees. Since MSWMPs and SCOs can be amended at any time, this language remains applicable today.

Commenter 22 provides a similar comment for the Tier B MS4 NJPDES permit for Part IV.B.2.g. [22]

Response 123: The Department disagrees with the comment. The citation of the Stormwater Management rules in Part IV.B.4.g of the Tier A NJPDES MS4 permit (and in Part IV.B.2.g of the Tier B NJPDES MS4 permit) is sufficient to incorporate the requirement to submit the SCO to the county review agency. All Tier A and Tier B Municipalities were required to adopt a Stormwater Management Plan under the 2004 and 2009 Tier A and Tier B MS4 NJPDES permits. Therefore, in the event that a municipality’s proposed stormwater management plan was conditionally approved or disapproved, the municipality’s existing stormwater management plan would still be compliant with the minimum standard. Furthermore, no additional deadlines

are required for updates initiated as a result of new or updated regulations, as Part IV.A.3.e of the Tier A and Tier B MS4 NJPDES permit states:

“e. The Tier A Municipality shall modify and update its stormwater program (including applicable plans and ordinances) to conform with applicable new legislation; or new or amended regulations. Such modification shall be completed and effective within 12 months of written notification by the Department of the need for modification.”

No changes have been made to the final permits as a result of this comment.

124. **Comment:** Regarding Part IV.B.4.h, Commenter 33 questions if the words “design and performance standards for stormwater management measures” should be more clearly defined by the additional words “as included in the municipal stormwater control ordinance as required in N.J.A.C. 7:8-5.1.” [33]

Response 124: Part IV.B.4.h is stated as follows:

“h. The Tier A Municipality shall only grant a variance or exemption from the design and performance standards for stormwater management measures if the municipality has a mitigation plan which meets the following requirements:

- i. A mitigation plan must be included in an approved MSWMP and stormwater control ordinance(s). The mitigation plan shall identify measures that are necessary to offset the deficit created by granting the variance or exemption, and can be provided through a menu of design and performance standards with corresponding mitigation projects for different drainage areas within the municipality. See Chapter 3 of the NJ Stormwater BMP Manual at www.nj.gov/dep/stormwater/ for guidance; and
- ii. The municipality submits, within 30 days after the grant of a variance or exemption, a written report to the county review agency and the Department describing the variance or exemption and the required mitigation. Submit the written report to the Department at:

NJDEP-DWQ-BNPC
Mail Code 401-02B
PO Box 420
Trenton, NJ 08625-0420”

This permit condition is intended to mean that the design and performance standards in the municipal stormwater control ordinance(s) that “a mitigation plan must be included in an approved MSWMP and stormwater control ordinance(s).” The Department maintains that the condition as written is appropriate.

No changes have been made to the final permits as a result of this comment.

125. **Comment:** Commenter 27 states that Part IV.B.4.h discusses “Waivers.” Commenter 27 suggests that the Department make available examples of approved municipal mitigation plans in order to facilitate their development by municipalities that still need to develop them. [27]

Response 125: As described in Part IV.B.4.h, the municipality can only grant a variance or exemption from the design and performance standards for stormwater management measures if a municipality has a mitigation plan which meets the requirements of Part IV.B.4.h.i and ii. However, the Department maintains that there are adequate resources available to assist a municipality with the development of mitigation plans, including access to existing mitigation plans as developed by other municipalities. Mitigation plans are a component of a municipality’s MSWMP where Part IV.B.1.b requires elements of a municipality’s MS4 stormwater program to be available to the public, including the MSWMP. Since the primary method of making an MSWMP public under Part IV.B.1.b is to post the MSWMP on a municipal web site, many existing mitigation plans will be readily accessible and available for review by other municipalities. Municipalities are also required to submit adopted MSWMP’s to their county review agencies. If a municipality approves any variance or exemption, the municipality is required by Part IV.B.4.h.ii to submit a written report to the county review agency and the Department describing the variance or exemption and the required mitigation. Therefore, a municipality could contact its county review agency for mitigation plans submitted by other municipalities.

In addition, and as noted at Part IV.B.4.h.i, Chapter 3 of the NJ Stormwater BMP Manual provides guidance for preparing a mitigation plan. Appendix C of the NJ Stormwater BMP Manual also addresses the preparation of a mitigation plan in the Sample MSWMP. Both sections of these guidance documents provide essential points, considerations, elements, and examples for preparing a mitigation plan.

While mitigation plans are available for review, municipalities should be aware that a mitigation plan is prepared in consideration of a municipality’s specific environmental constraints and resources in order to compensate for the impact from the exemption or variance granted by the municipality. Therefore, a mitigation plan developed specifically for one municipality may not be appropriate for another. In other words, one municipality should not rely expressly on another municipality’s mitigation plan in preparing its own mitigation plan.

No changes have been made to the final permits as a result of these comments.

126. **Comment:** Commenter 3 has concerns regarding Part IV.B.4.j.ii which requires Tier A Municipalities to ensure long term cleaning, operation and maintenance of storm water management measures on properties not owned or operated by the Tier A Municipality. [3]

Response 126: Please refer to **Response 190-194** which contains a detailed response on maintenance of stormwater management measures on properties not owned or operated by the Tier A Municipality._

127. **Comment:** Commenter 22 states that Part IV.B.4.k stipulates that “ non-structural stormwater measure (e.g. stormwater management basin, manufactured treatment device, green infrastructure)”, the Tier A Municipality shall complete, update, finalize, and maintain a “Major Development Stormwater Summary.” The name “Major Development Stormwater Summary” implies that Part IV.B.4.k is limited to “major development” as defined in the draft permit. Ambiguity in this regard is unacceptable. Commenter 22 raises a similar comment regarding Part IV.B.2.k on the Tier B MS4 NJPDES permit. [22]

Response 127: The form in question, “Attachment D – Major Development Stormwater Summary,” is comprised of several sections which include general information, site design specifications, storm event information, and separate sections for the specifications of each BMP incorporated into a project. The first row of the Site Design Specifications is where the site area, area of disturbance, and area of proposed impervious (surface) is included. The applicant can utilize this section to ascertain whether the project ultimately disturbs one or more acres, and thereby determine whether a project meets the definition of “major development” as defined in Notes and Definitions Part IV.B.1.h.

No changes have been made to the final permits as a result of this comment.

128. **Comment:** Regarding Part IV.B.4.k.iii, Commenter 33 questions if the words "Certificate of Occupancy" need further definition or cross reference. Commenter 33 suggests that the words, "or, satisfactorily been completed" be added. [33]

Response 128: An excerpt of Part IV.B.4.k.iii is stated as follows:

“k. For each structural and non-structural stormwater measure (e.g. stormwater management basin, subsurface infiltration/detention system, manufactured treatment device, green infrastructure), the Tier A Municipality shall:

iii. Finalize the Major Development Stormwater Summary once certificate of occupancy is issued; and...”

The Department does not agree that it is appropriate to define or further qualify “certificate of occupancy” in the final Tier A and Tier B MS4 permits as any definition could contravene existing local requirements. Additionally, the Department maintains that issuance of a certificate of occupancy is a clear requirement whereas “or, satisfactorily been completed” could be subjective.

No changes have been made to the final permits as a result of this comment.

129. **Comment:** Regarding Part IV.B.4.k.iv, Commenter 33 suggests to add the words “and public” after Department. [33]

Response 129: Part IV.B.4.k.iv requires the municipality to “Maintain a completed Major Development Stormwater Summary and make it available to the Department upon request.”

The Department does not agree that a requirement to make this summary available to the public is necessary as the public already has access to this information via other means._

Part IV.B.1.iii of the Tier A MS4 NJPDES permit establishes public notice requirements related to applications for development. Applications for development, under Part IV.B.4.k.i trigger the obligation for the municipality to complete Attachment D. The completed Attachment D is required to be maintained by the municipality under Part IV.B.4.k.iv and would therefore be part of the public record. Public records can be requested through the Open Public Records Act (OPRA) which would ensure that tracking occurs. Based on the above, the Department maintains that it is not necessary to add the words “and public” to Part IV.B.4.k.iv.

No changes have been made to the final permits as a result of this comment.

130. **Comment:** Commenter 22 states that the draft MS4 NJPDES permit unlawfully includes parts of the Tier A Municipality that do not discharge stormwater or pollutants into the MS4 or MMY owned or operated by that Municipality. However, in accordance with N.J.A.C. 7:14A-25.6(b)3i and with EPA municipal stormwater rules at 40 CFR 122.34(b)(5)(i), the SBR for “Post-Construction Stormwater Management in New Development and Redevelopment” in the current 2009 Tier A MS4 NJPDES Permit, the Part I.F.3.a Minimum Standard is expressly restricted to certain new development and redevelopment projects “that discharge into the municipality's small MS4.”

In contrast, Part IV.B.4 “Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment” replace this restriction with the following opposite policy in Part IV.B.4.l:

“The Stormwater Management rules (N.J.A.C. 7:8) and the Residential Site Improvement Standards for stormwater management (N.J.A.C. 5:21-7), independently and as implemented in this permit, apply to all areas of the Tier A Municipality.”

The issue here is whether the RSIS and N.J.A.C. 7:8 as implemented in this permit can lawfully apply to all areas of every regulated Tier A Municipality.

Response 130: Please refer to **Response 50** regarding the Department’s position on MMY that do not discharge into the MS4.

Regarding the concerns raised in this comment regarding Part IV.B.4.l, the Department maintains that the RSIS and N.J.A.C. 7:8 can apply to all areas of the Tier A Municipality. Part IV.B.4.l is stated as follows:

- “1. The Stormwater Management rules (N.J.A.C. 7:8) and the Residential Site Improvement Standards for stormwater management (N.J.A.C. 5:21-7), independently and as implemented in this permit, apply to all areas of the Tier A Municipality.”

The ability to issue MS4 permits on a jurisdictional basis and not on a system specific basis can be found within the Clean Water Act at Section 402(p)(3)(B). The exact language of this section is as follows:

- “(B) Municipal discharge
Permits for discharges from municipal storm sewers –
(i) may be issued on a system- or jurisdiction-wide basis;
(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”

Also, 40 CFR 122.34(c)(1) allows for more stringent terms and conditions to be included in the permit if it is determined that they are necessary to protect water quality:

- “(c) Other applicable requirements. As appropriate, the permit will include:

(1) More stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis, or where the Director determines such terms and conditions are need to protect water quality.”

Based on the two sections referenced above, the Department has determined that the most effective way of regulating discharges from small MS4s is on a jurisdictional (i.e., municipal-wide) basis, rather than a system-wide basis and that applying the post construction requirement to the entire municipality is a condition required to protect water quality.

The Municipal Land Use Law and Stormwater Management Act at N.J.S.A. 40:55D-95 do not distinguish between discharges to MS4s or directly to surface water. One of the primary objectives of the Stormwater Management Act is to prevent flooding and protect water quality from stormwater runoff. N.J.S.A. 40:55D-95 states the following:

“A storm water management plan and a storm water management ordinance or ordinances shall conform to all relevant federal and State statutes, rules and regulations concerning storm water management or flood control and shall be designed: a. to reduce flood damage, including damage to life and property; b. to minimize storm water runoff from any new land development where such runoff will increase flood damage; c. to reduce soil erosion from any development or construction project; d. to assure the adequacy of existing and proposed culverts and bridges; e. to induce water recharge into the ground where practical; f. to prevent, to the greatest extent feasible, an increase in nonpoint pollution; g. to maintain the integrity of stream channels for their biological functions, as well as for drainage; and h. to minimize public safety hazards at any storm water detention facilities constructed as part of a subdivision or pursuant to a site plan. A storm water management plan shall also include such structural changes and such additional nonstructural measures and practices as may be

necessary to manage storm water. For purposes of this act "nonpoint pollution" means pollution from any source other than from any discernible, confined and discrete conveyance, and shall include, but not be limited to, pollutants from agricultural, silvicultural, mining, construction, subsurface disposal and urban runoff sources."

Furthermore, the RSIS at N.J.A.C. 5:21 and the Stormwater Management rules at N.J.A.C. 7:8 do not distinguish between discharges to sewer systems or to surface water. As defined by both rules:

"Stormwater" means water resulting from precipitation (including rain and snow) that runs off the land's surface, is transmitted to the subsurface, or is captured by separate storm sewers or other sewage or drainage facilities, or conveyed by snow removal equipment. "

In addition, N.J.A.C. 7:8-4 Municipal Stormwater Management Planning, which describes the requirements for Municipal Stormwater Management Plans and Stormwater Control Ordinances, does not distinguish between areas discharging to the small MS4 and areas that do not. For example, N.J.A.C. 7:8-4.2(c)4 requires the Municipal Stormwater Management Plan to incorporate the design and performance standards in N.J.A.C. 7:8-5 (or alternative design and performance standards). N.J.A.C. 7:8-5.1(a) specifically states "This subchapter establishes design and performance standards for stormwater management measures for major development..." The Tier A and Tier B MS4 permits define "major development" as "**any** development that provides for ultimately disturbing one or more acres of land and any additional development defined as "major development" by a municipality's stormwater control ordinance."

Based on the authority provided to the Department by the Clean Water Act, NJPDES Phase II Regulations, Municipal Land Use Law and Stormwater Management rules, the Department believes that the post construction requirements in this permit can fully apply to all areas of every regulated Tier A Municipality.

No changes have been made to the final permits as a result of this comment.

131. **Comment:** Commenter 22 states that Part IV.B of the Tier B MS4 NJPDES permit overlaps or conflicts with the NJPDES CSO permits issued in 2015. In the SBR for "Post-Construction Stormwater Management in New Development and Redevelopment," the restriction in the current 2009 Tier B MS4 NJPDES permit at Part I.F.2.a of "that discharge into the municipality's small MS4" is replaced with the following opposite policy in Part IV.B.2.1:

"1. The Stormwater Management rules (N.J.A.C. 7:8) and the Residential Site Improvement Standards for stormwater management (N.J.A.C. 5:21-7), independently and as implemented in this permit, apply to all areas of the Tier B Municipality."

"All areas" presumably includes areas served exclusively by CSS.

Commenter 22 states that the requirement in Part IV.B.2.j of the draft permit to "ensure, as set forth in Attachment E, ... adequate long-term cleaning, operation and maintenance of stormwater

management measures ... owned or operated by the Tier B Municipality” and “not owned or operated by the Tier B Municipality and not subject to the conditions of another NJPDES stormwater permit,” is coupled with the requirement in Attachment E – Stormwater Facilities Maintenance to “develop, update and implement a program to ensure adequate long-term cleaning, operation and maintenance of all municipally owned or operated stormwater facilities” and “not owned or operated by the Tier B Municipality, not subject to the conditions of another NJPDES stormwater permit and constructed after February 7, 1984.” These requirements apparently apply not only to MS4 facilities but also to most municipally owned or operated CSS facilities. Nothing in these requirements restrict their scope to stormwater facilities that discharge into the MS4 owned or operated by the Tier B Municipality. Instead, Section 7.A.2.d.2 of the Fact Sheet for the draft permit expressly rejects this restriction.

Similarly, Commenter 22 states that the draft Tier B MS4 NJPDES permit includes unlawfully large geographic scope of post construction control and public education measures that do not discharge stormwater or pollutants into the MS4. However, in accordance with N.J.A.C. 7:14A-25.8(e)1 and 25.6(b)3i, the SBR for “Post-Construction Management in New Development and Redevelopment” in the current 2009 Tier B MS4 NJPDES permit, the Part I.F.2.a Minimum Standard is expressly restricted to certain new development and redevelopment projects “that discharge into the municipality’s small MS4.”

In contrast, Part IV.B.2 “Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment” replace this restriction with the opposite policy in Part IV.B.2.1 as described above. The issue here is whether the RSIS and N.J.A.C. 7:8 as implemented in this permit can lawfully apply to all areas of every regulated Tier B Municipality. [22]

Response 131: As described above for the same section within the Tier A MS4 NJPDES permit (Part IV.B.4) in **Response 130**, the Department maintains that the RSIS and N.J.A.C. 7:8 can apply to all areas of the Tier B Municipality.

No changes have been made to the final permits as a result of this comment.

Attachment C – Design Standards for Storm Drain Inlets

132. **Comment:** Regarding Attachment C, Commenter 18 asks that the exemption described in the first bullet in the section entitled Exemption from the Design Standard be removed as it conflicts with the last element of the Design Criteria and is less stringent.

Additionally, regarding this same section Commenter 18 recommends rewording the third bullet in the section entitled Exemption from the Design Standards to:

“...prevent delivery of all solid and floatable materials 5 millimeter (mm) in size or larger that could not pass through one of the following...”

Commenter 18 states that this will ensure capture of small and abundant items, such as cigarette butts, bottle caps, and candy wrappers. California, for example, has implemented 5 mm criteria in order to protect its surface waters and coastal economies. [18]

Response 132: The Department disagrees with the commenter's contention that the first bullet in the section conflicts with the third bullet. Specifically, the first bullet within this section of Attachment C is stated as follows:

“Where each individual clear space in the curb opening in existing curb-opening inlets does not have an area of more than nine (9.0) square inches.”

The third bullet is stated as follows:

“Where flows from the water quality design storm as specified in N.J.A.C. 7:8 are conveyed through any device (e.g., end of pipe netting facility, manufactured treatment device, or a catch basin hood) that is designed, at a minimum, to prevent delivery of all solid and floatable materials that could not pass through one of the following:

A rectangular space four and five-eighths inches long and one and one-half inches wide (this option does not apply for outfall netting facilities); or

A bar screen having a bar spacing of 0.5 inches;”

The Department maintains that the exemption provided in the third bullet is as protective as the Design Standard. As stated on page 24 of the Tier A MS4 NJPDES permit Fact Sheet, the requirements in Attachment C (Design Standards for Storm Drain Inlets) are unchanged from the 2009 Tier A MS4 NJPDES permit, although reformatted and clarified. This exemption dates to the final 2004 Tier A MS4 NJPDES permit and only applies to existing curb-opening inlets where each individual clear space does not have an area of more than 9 square inches. This exemption acknowledges the effort made and expense incurred voluntarily by municipalities which installed solid and floatable materials limiting storm drain inlets prior to 2004. It is important to note that municipalities must still comply with the curb-opening inlet design standard in Attachment C with respect to new development or redevelopment projects, and to existing curb-opening inlets that do not qualify for this exemption.

Regarding the second portion of this comment in which Commenter 18 suggests that the size opening be changed to 5 mm, the Department maintains that such a restrictive size opening would need additional study and likely would need a change in regulations given this significant change from current requirements. While the Department agrees that a 5 mm opening could prevent small size objects such as cigarette butts, bottle caps etc. from entering waterbodies, this limited size opening would also easily clog thereby leading to excessive flooding on municipal streets.

No changes have been made to the final permit as a result of this comment.

Attachment D – Major Development Stormwater Management Summary

133. **Comment:** Commenter 15 expresses support regarding the addition of Attachment D (Major Development Stormwater Management Summary) as it provides the Department with a tool to assess whether the municipality is complying with the stormwater rules. Commenter 15 states that Attachment D provides a concise overview of important criteria to assist municipalities in ensuring compliance with design and performance standards for stormwater management measures in major development. However, Commenter 15 states that important information has been omitted from this form that would help further municipal compliance and Department enforcement efforts.

Commenter 15 includes in their comments a review by Princeton Hydro as Exhibit A. This review details recommendations for the inclusion of additional information within Attachment D. [15]

134. **Comment:** Regarding Part IV.B.4.k and Attachment A, Commenter 27 states that the municipality should not be completing Attachment D (Major Development Stormwater Summary). Instead, the applicant should be required to complete it and the municipality should be required to review it as part of the approval process. [27]

Response 133-134: The Department maintains that Attachment D as included in the draft Tier A and Tier B MS4 permits is useful as written and that completion by the municipality is appropriate. Attachment D incorporates the information necessary to determine if the proposed development complies with the design and performance requirements in the Stormwater Management rules, N.J.A.C. 7:8-5. Attachment D combines administrative information as well as technical information from site plans and stormwater management report, such as hydrology and hydraulics for pre and post development conditions that are necessary for the review of a site. The person completing Attachment D could include any individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality; typically, a municipal engineer. Attachment D is a screening tool for the Department and is therefore not intended as a comprehensive checklist for engineering review of design.

The Department also maintains that completion of Attachment D by the municipality is appropriate. However, the municipality could delegate this responsibility to any individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality; typically, a municipal engineer.

While the Department acknowledges the suggestions for Attachment D as described in **Comment 134**, the Department maintains that Attachment D as originally proposed in the draft Tier A and Tier B MS4 NJPDES permits, and included in the final permits, serves the intended purpose.

No changes have been made to the final permits as a result of this comment.

135. **Comment:** Commenter 18 recommends that the Contact Information at the bottom of Attachment D include the contractor information (name and phone number). Commenter 18 states that this will help municipalities in case there is a particular contractor associated with non-performing/failing stormwater facilities. [18]

Response 135: The Department disagrees with this comment. Attachment D is to be completed by individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality; typically, a municipal engineer. This is appropriate since the permit is issued to the municipality who is the regulated entity. Please refer to **Response 133-134** above.

No changes have been made to the final permits as a result of this comment.

136. **Comment:** Commenter 11 notes that Attachment D provides a description for “Basin Specifications.” Commenter 11 suggests that the Department provide similar guidance for specifications related to other types of Best Management Practices (BMPs) that may be utilized in the design. [11]

Response 136: The Department chose to provide a checklist for basins as Attachment D since basins are the most commonly used stormwater management measure. In addition, basin design is subject to more design variables as compared to other stormwater management measures and is therefore more suitable for a checklist.

Note that Attachment D is not intended for design guidance. All design guidance for stormwater management measure can be found in the NJ Stormwater Best Management Practices Manual (BMP Manual). The website link to the BMP Manual can be found at www.njstormwater.org/bmp_manual2.htm.

No changes have been made to the final permits as a result of this comment.

Part IV.B, SBRs and Associated Conditions

5. Minimum Standards for Pollution Prevention / Good Housekeeping for Municipal Operators, Attachment E (Tier A MS4 Permit only)

137. **Comment:** Commenter 15 states that Part IV.B.5.a does not meet the “clear, specific, and measurable” EPA standard since it does not provide specific direction about how the Department’s sample ordinances are to be used by the MS4 permittee in satisfying the permit’s requirements to adopt various types of community ordinances. In addition, Commenter 15 states that Part IV.B.5.a does not provide clear information about how the Department will use these sample ordinances to assess the sufficiency of the ordinances that an MS4 permittee has adopted. The Tier A MS4 NJPDES permit simply states that the MS4 permittee shall “adopt and enforce the following community wide ordinances to address improper disposal of waste,” lists the types of ordinances that are required, and then directs the MS4 to “[s]ee the Tier A Municipal Guidance document . . . for a sample ordinance.” Commenter 15 questions if the elements of

the sample ordinances are mandatory or merely suggestions. Commenter 15 states that the permit must be more clear on this point; as written, it does not obviously apply any specific or measurable standard to the sufficiency of an MS4's ordinances.

Commenter 15 further states that the sample ordinances at Part IV.B.4.g. (Stormwater Control Ordinance), Part IV.B.6.d. (Illicit Connection Ordinance) and Part IV.B.5.a (Community Wide Ordinances) are substantively too weak. For example, these ordinances leave too many details to the permittees in terms of enforcement procedures and penalties for noncompliance. In the sample ordinances, the "Enforcement" section provides:

"This ordinance shall be enforced by the [Police Department and/or other Municipal Officials] of [insert name of municipality]."

The "Penalties" section of the sample ordinances provides:

"Any person(s) who is found to be in violation of the provisions of this ordinance shall be subject to a fine not to exceed [insert amount]."

Commenter 15 suggests that the Department provide more specific enforcement provisions in the sample ordinances similar to EPA's "Model Illicit Discharge and Connection Stormwater Ordinance" as an example. EPA's model ordinance specifically outlines enforcement actions that the municipality could undertake, including the following: the performance of monitoring, analyses, and reporting; the elimination of illicit connections or discharges; ordering violating discharges, practices, or operations to cease and desist; the abatement or remediation of storm water pollution or contamination hazards and the restoration of any affected property; payment of a fine to cover administrative and remediation costs; and the implementation of source control or treatment BMPs. The Department should require permittees to select from a similar list of options in its sample ordinances to provide clearer direction. [15]

Response 137: The Department disagrees with the comments suggesting that Part IV.B.5.a is not clear, specific and measurable. Part IV.B.5.a requires Tier A Municipalities to adopt and enforce various community wide ordinances and, as explained in Attachment A and A-1, the measurable standard for these ordinances is to "Certify in each annual report the date the ordinance was adopted and that it is being enforced. A log of enforcement actions shall be kept in the SPPP." The Department will be able to verify compliance with this standard by reviewing annual reports and enforcement logs, as well as through the municipal stormwater audit process.

Part IV.B.4.g (Stormwater Control Ordinance), Part IV.B.5.a (Community Wide Ordinances) and Part IV.B.6.d (Illicit Connection Ordinance) require Tier A Municipalities to adopt and enforce either the model ordinances listed in the Department's Tier A Municipal Stormwater Guidance Document or develop, adopt and enforce a different ordinance that meets the minimum standard. The Department maintains that it would be impracticable and inappropriate for the model ordinances to include more specificity about who in the municipality must enforce the ordinance and the required enforcement penalties. Through the municipal stormwater audit process, the Department has found that local authority to enforce these ordinances varies greatly and that

imposing fines to remedy ordinance violations is rarely the most effective way to enforce the ordinances. Verbal and written warnings and local public education about the ordinances is often sufficient to achieve compliance. Therefore, Tier A Municipalities must have flexibility in how they enforce their ordinances.

Because the Department can review the municipal ordinances and enforcement logs at any time to determine compliance with the minimum standard, this requirement is not self-regulatory in nature. Note that many of the community wide ordinances (i.e., pet waste ordinance, litter ordinance, improper disposal of waste ordinance, wildlife feeding ordinance and yard waste ordinance/collection program) require specific knowledge of the community and its residents.

No changes have been made to the final permits as a result of this comment.

138. **Comment:** Regarding Part IV.B.5.a.v which concerns containerized yard waste/yard waste collection program ordinances, Commenter 18 suggests adding criteria that are clear, specific and measurable to be considered in establishing the schedule. This will ensure that the permit places boundaries around the MS4's discretion in setting the schedule as opposed to seemingly leaving the yard waste pickup schedule entirely to the MS4 permittee. [18]

Response 138: As stated in Part IV.B.5.a.v:

“...The frequency of yard waste pickups shall be determined at the discretion of the Tier A Municipality but shall be part of a set yard waste collection schedule which is noticed to all municipal residents and businesses...”

The Department disagrees with the change proposed in this comment as prescribing a one-size-fits-all leaf pick-up schedule for hundreds of Tier A municipalities would be impracticable and onerous. Flexibility in scheduling is necessary in a yard waste pick-up program to accommodate for site-specific factors such as limited or changing municipal resources, equipment breakdown, weather, and topographic differences. However, this flexibility in scheduling is also protective since the permit is specific in requiring that the municipal ordinance, “prohibits placing non-containerized yard waste at the curb or along the street within 10 feet of any storm drain inlet and at any time other than a set yard waste collection schedule.” The Tier A MS4 NJPDES permit also allows a municipality a second option for this SBR, allowing only containerized yard waste to be placed in the street for collection. In either case, the key to implementing the SBR in an environmentally protective manner is through enforcement of the yard waste ordinance.

No changes have been made to the final permit as a result of this comment.

139. **Comment:** Commenter 15 states that Part IV.B.5.a.v (Yard Waste Ordinance) does not meet the “clear, specific, measurable” standard as established in EPA’s recent MS4 rule revisions. In the preamble to the rule, the agency discusses permit requirements to take an action “at a frequency determined by the permittee” and concludes: “This type of provision includes no minimum frequency that can be used to measure adequacy and, therefore, would not constitute a

measurable requirement for the purposes of the rule (81 Fed. Reg. at 89,335). Comment 15 states that the Department should establish a minimum frequency for permittees to incorporate into their yard waste ordinances. [15]

Response 139: The Department disagrees with the comment. The Tier A Municipality has the option of enacting either (or both) of the ordinances described in Part IV.B.5.a.v of the draft Tier A MS4 NJPDES permit and is required to post the schedule for yard waste pick-ups on their website. This requirement is both clear and specific. As stated in Appendices A and A-1, the measurable goal is to “certify in each annual report the date the ordinance was adopted and that is being enforced. A log of enforcement actions shall be kept in the SPPP.” The frequency of yard waste pickups is based on the specific need of the municipality because the amount of leaf litter and vegetative waste, as well as the availability of staff and equipment, varies from town to town.

No changes have been made to the final permit as a result of this comment.

140. **Comment:** Regarding Part IV.B.5.b.i, Commenter 33 suggests the addition of the following paragraph: “All other streets that meet conditions 1 thru 4 SHALL be swept twice a year. These shall be preferable in spring and fall.” [33]

Response 140: The Department maintains that the street sweeping requirements included at Part IV.B.5.b.i reflect the Department’s interpretation of the intent of the Federal MS4 program’s pollution prevention requirements at 40 CFR Part 122.34(b)(6). As described in this permit condition these are minimum requirements as noted by the language “at a minimum of once per month (weather and street surface conditions permitting).” Municipalities may conduct more extensive street sweeping operations where feasible.

No changes have been made to the final permit as a result of this comment.

141. **Comment:** Regarding Part IV.B.5.b.ii, Commenter 33 suggests deletion of the words “five years” and replace that with “year.” [33]

Response 141: The Department disagrees with this comment. Part IV.B.5.b.ii describes catch basin and storm drain inlet inspection and cleaning and specifies that each catch basin and inlet shall be inspected at least once every five years. Additionally, this condition specifies that the Tier A Municipality shall clean any municipally owned or operated storm drain inlet or catch basin as frequently as necessary to eliminate recurring problems and restore proper function. While each catch basin and inlet is required to be inspected each five years, this permit language as written allows municipalities flexibility in implementing the requirement in an effort to acknowledge limited resources. The Department does not agree that an annual inspection requirement is appropriate given that the requirement already speaks to proper function and operation.

No changes have been made to the final permit as a result of this comment.

142. **Comment:** Commenter 14 states that a majority of the suggested revisions improve the readability and clarity of the permit while providing for enhanced protection of our water resources. In particular, Commenter 14 states that the revised Part IV.B.5.c “Municipal Maintenance Yards and Other Ancillary Operations” has been substantially improved with the addition of BMPs on “Aggregate Materials and Construction Debris,” “Yard Trimmings and Wood Waste Management Sites,” and “Roadside Vegetation Management.” The stronger language related to the temporary outdoor storage of salt and de-icing material and storage requirements for street sweepings and catch basin cleanout materials also furthers the program’s aims. [14]

Response 142: The Department acknowledges these comments in support of the readability and clarity of the Tier A MS4 NJPDES permit. The Department agrees that a regulatory document that is clear in its permit conditions helps ensure better implementation efforts and compliance for regulated municipalities. The Department also acknowledges the remarks in this comment in support of BMPs regarding “Aggregate Materials and Construction Debris,” “Yard Trimmings and Wood Waste Management Sites,” and “Roadside Vegetation Management” as included in Attachment E of the Tier A MS4 NJPDES. The Department agrees that these specific BMPS will assist Tier A Municipalities in proper management of these materials which should result in water quality improvements.

143. **Comment:** Commenter 14 states that while they support that unpermitted discharges to storm sewer inlets associated with equipment and vehicle washing (Part IV.B.5.c) are now prohibited, it is not clear why the recording/reporting requirement associated with vehicle and equipment washing has been removed. [14]
144. **Comment:** Commenter 18 notes that Part I.F.8.b.i of the current Tier A MS4 permit requires Tier A Municipalities to maintain a record of where and when equipment and vehicle washing occurs to document proper management of wash water discharge. However, Attachment E of the Tier A MS4 permit renewal seems to only require maintenance of a log in two instances: inspections of containment structures (if the system design allows for it) or when the containment structure is cleaned out. Commenter 18 questions if the Department is no longer requiring these facilities and sites to maintain records of when and where vehicle and equipment washing occurs. [18]

Response 143-144: This comment refers to the 2009 Tier A MS4 NJPDES permit where Part I.F.8 pertains to Equipment and Vehicle Washing and states:

- “i. Minimum Standard - Tier A Municipalities shall manage any equipment and vehicle washing activities so that there are no unpermitted discharges of wash wastewater to the surface or ground waters of the State.

Tier A Municipalities shall maintain a record of where and when equipment and vehicle washing occurs to document proper management of wash water discharge.”

As previously written this language was confusing in that the first paragraph condoned unpermitted discharges but yet the second paragraph suggested that on site washing of vehicles was acceptable so long as a log was kept.

This requirement was improved in the Tier A MS4 NJPDES permit renewal by incorporating changes to Attachment E (Best Management Practices for Municipal Maintenance Yards and Other Ancillary Operations) through inclusion of the following conditions:

- “1. Manage any equipment and vehicle washing activities so that there are no unpermitted discharges of wash wastewater to storm sewer inlets or to waters of the State.
2. Tier A Municipalities which cannot discharge wash wastewater to a sanitary sewer or which cannot otherwise comply with 1, above, may temporarily contain wash wastewater prior to proper disposal...”

Attachment E includes additional conditions to address the temporary containment of vehicle wash water on site. This change was informed by numerous site inspections where it was determined that many municipalities do store vehicle wash water on site. The Department maintains that these changes to Attachment E constitute improvements over the previous language and encourages no unpermitted discharges of wash wastewater.

No changes have been made to the final permit as a result of this comment.

- 145. Comment:** Commenter 15 states that Part IV.B.5.d proposes to reduce municipal employee training requirements from once per year (as required in the 2009 permit) to once every two years, for most types of training yet the Department offers no explanation for this change. Absent any such explanation, Commenter 15 states that the reduced requirement violates the MEP standard, because if annual training was practicable between 2009 and now, then presumably it will continue to be practicable during the upcoming permit term as well. If the Department believes that the reduced training frequency is justified on MEP grounds (e.g., because the permit’s terms will result in better, more role-oriented training that better prepares municipal staff for their duties despite the decrease in frequency), then it must say so and back up this assertion with supporting information. [15]

Response 145: The Department provided information regarding the Employee Training requirements, as well as improvements to these permit requirements, on page 35 of the Tier A MS4 NJPDES permit Fact Sheet:

“The draft Tier A MS4 NJPDES permit requirement has modified this permit component where Tier A Municipalities shall develop, update and implement an employee training program to address Tier A MS4 NJPDES permit components and SPPP requirements. As specified in Attachment A (Measurable Goals and Implementation Schedule) for existing permittees, the Tier A Municipality is required to maintain records of employee training including sign in sheets; date of training; and training itinerary. These records shall be kept in the SPPP. Please refer to Attachment A-1 for new permittees. All municipal employees

shall receive training on those stormwater topics applicable to their title and duties. This includes new employees as well as those employees whose work responsibilities change.

Training shall occur at least once every two years (unless specified otherwise) and shall include the following topics, at a minimum, depending on an employee's title and duties. Training for new employees shall occur within three months of commencement of duties. In order to assist municipalities in meeting training requirements; the Department has posted a Stormwater Training link to training materials at www.nj.gov/dep/stormwater/training.htm. This link will continue to be updated by the Department as training resources are developed or identified."

As stated above, the Department has revised the municipal employee training requirements to ensure new employees are trained within three months of their start dates and to focus training of existing municipal employees on topics which contribute the most to reducing stormwater pollutants, namely maintenance yard operations, stormwater facility maintenance and the Tier A Municipality's SPPP. Additionally, annual detailed training is also required on any component applicable to an employee's title and duties as per Part IV.B.5.d.x of the Tier A MS4 NJPDES permit. Together, these training requirements provide more specificity as compared to the 2009 Tier A MS4 NJPDES permit.

No changes have been made to the final permit as a result of this comment.

146. **Comment:** Regarding Part IV.B.5.d.ii, Commenter 33 suggests deletion of the word "Monthly," "certain," and "in predominantly commercial areas." [33]

Response 146: Federal regulations at 40 CFR 122.34(b)(6) addresses pollution prevention/good housekeeping for municipal operations. To comply with this federal requirement, Part IV.B.5.d.ii addresses employee training including coverage of monthly sweeping of certain streets in predominantly commercial areas whereas the actual monthly street sweeping requirement is included in Part IV.B.5.b.i. The Department maintains that a monthly frequency requirement for qualifying roads is appropriate where this frequency should be considered the minimum necessary to produce environmentally protective effects while still remaining fiscally prudent. The Department encourages Tier A Municipalities to expand their programs and conduct more extensive street sweeping operations where feasible.

Regarding the other two wording suggestions contained in this comment, inclusion of the word "certain" must remain, as not every street is required to be swept where the criteria is dependent on the posted speed limit and zoning. The intent to focus on street sweeping "in predominantly commercial areas" must also remain as commerce in these areas tends to produce more solids than would be generated in residential areas or even in industrial areas.

No changes have been made to the final permit as a result of this comment.

147. **Comment:** Regarding Part IV.B.5.d.v and Part IV.B.5.d.vii, Commenter 33 suggests deletion of the word “annually” as once every two years or within three months of employment may be sufficient. [33]

Response 147: Part IV.B.5.d.v requires the permittee to provide annual training on the inventory of materials and machinery, inspections and good housekeeping; fueling operations; discharge of stormwater from secondary containment; vehicle maintenance; on-site equipment and vehicle washing and wash wastewater containment; salt and de-icing material storage and handling; aggregate material and construction debris storage; street sweeping, catch basin clean out, and other material storage; yard trimmings and wood waste management sites.

While 40 CFR 122.34 does not indicate a minimum frequency for employee training, the Department maintains that an annual frequency is appropriate and is consistent with the 2009 Tier A MS4 NJPDES permit. The Department does not agree that it is necessary to indicate a prescribed training frequency for new employees but anticipates that municipalities would inform new employees of these requirements.

No changes have been made to the final permit as a result of this comment.

148. **Comment:** Regarding Part IV.B.5.e, Commenter 18 recommends that design engineers, municipal engineers and other individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality complete the Stormwater Management Design Review Course every two years. Commenter 18 states that more frequent training will maintain a strong working knowledge of the program’s core components and discrete details, and lead to better protected surface waters with higher water quality. [18]

Response 148: Part IV.B.5.e states:

“e. **Stormwater Management Design Review Training:** The Tier A Municipality shall ensure that all design engineers, municipal engineers and other individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality, complete the Department approved Stormwater Management Design Review Course (see www.njstormwater.org/training.htm) once every five years. This includes those individuals that review any projects that are subject to the Tier A Municipality’s municipal stormwater management plan and control ordinance as described in Part IV.B.4 (Post Construction).”

This free training is a new permit requirement and is representative of the Department’s commitment to enhancing water quality through the federally required 40 CFR 122.34(b)(5) post-construction storm water management in new development and redevelopment program. The five-year timeframe as noted in the permit condition above was established based on the fact that there are four hundred fifty-seven (457) Tier A municipalities in New Jersey. This training requirement was incorporated into the draft Tier A MS4 NJPDES permit before voluntary enrollment in the course began.

Responses to a recent survey emailed to all municipal stormwater coordinators indicated that the majority of municipalities have between three and five persons currently conducting reviews of stormwater management designs. The Department completed a two-day reviewer training in May 2017. Roughly one hundred reviewers voluntarily enrolled and others were wait-listed. From the feedback received, it appears even more people than previously indicated are directly involved in performing such reviews and require training. Additionally, reviewers from Tier B municipalities and other Tier A and B municipal staff and consultants are interested in receiving this training once the Tier A reviewers have done so.

Therefore, until such time as every person performing reviews and those interested in receiving training to do so are brought up to the same level, the Department anticipates 100% enrollment in every session that the course is offered. In the meantime, the Department is evaluating the course effectiveness and seeking larger venues to host future design reviewer training. The Department maintains that a once every five year requirement is appropriate given current resources.

No changes have been made to the final permit as a result of this comment.

149. **Comment:** Commenter 15 expresses support for the Department's inclusion of new proposed permit conditions that clarify municipalities' obligation to conduct stormwater reviews and require enhanced training for design engineers and municipal officials. At the same time, however, Commenter 15 states that these improvements in the permit must be coupled with vigorous state enforcement to ensure compliance with the post construction standards. In our 2014 petition, we documented numerous instances of MS4s failing to enforce the state's post-construction standards for new development and redevelopment (in N.J.A.C. 7:8 et seq.). Commenter 15 cites the Delaware Riverkeeper Network's Hamilton Township Case Study, which found widespread and almost uniform "non-compliance with the nonstructural stormwater management strategies, a central tenet of the [stormwater] rules," as well as multiple failures to enforce other requirements such as groundwater recharge and runoff quality and quantity standards (Delaware Riverkeeper Network, New Jersey Stormwater Management Implementation: A Case Study of Hamilton Township, Mercer County at 14 (May 2010), hereinafter "DRN Hamilton Case Study"). Instances of noncompliance were attributed to likely "[m]isinterpretation of the [stormwater] rules, incorrect usage of data and apparent carelessness. These issues were not confined to Hamilton Township; investigations have also found inadequate review of development stormwater plans in municipalities across the state. The Department's recent audit of Hopewell Township's MS4 program found that it, too, had not been conducting local stormwater reviews because its officials were "uncertain whether major development plans must be reviewed locally for stormwater management compliance if those same plans were also being reviewed by the Department." (NJDEP, Preliminary Stormwater Audit of Hopewell Township, Mercer County, NJPDES Permit Number NJG0150622, PI Number 202083 (Mar. 4, 2016).)

In many cases, municipalities have believed that they did not need to review development applications for stormwater compliance in cases where the developer also requires a permit from the Department. Even when municipal staff do review development applications, they often fail

to enforce all the requirements of state stormwater regulations due to misinterpretation of the rules or inadvertent oversights. To ensure compliance with the post-construction standards, we called for two additions to the permit: (1) an explicit mandate to conduct stormwater reviews for all residential and commercial development applications, even if a permit is required by the Department for the same activity, and (2) a requirement for municipal engineers and municipal officials to receive adequate training regarding how to apply the performance standards.

Commenter 15 expresses appreciation and strongly supports the Department's decision to include these two new requirements in the draft permit. These requirements will help reinforce a municipality's obligations under the permit and improve the level of knowledge by staff and board members in applying those requirements. Permit condition IV. B.4.d., which clarifies that municipal officials must review and analyze development applications for compliance with the stormwater rules (N.J.A.C. 7:8) even if the Department is performing or has performed its own review of the project for a separate state permit, will help eliminate confusion as the municipality's role in reviewing stormwater plans is clearly articulated. As outlined in our petition, Commenter 15 expected that such explicit confirmation of the municipality's role as an independent stormwater reviewer will help improve municipal compliance with the stormwater rules. [15]

Response 149: The Department acknowledges the commenter's support. The Department agrees that revisions included in the Tier A MS4 permit will improve permittee understanding and increase the rate of compliance. The conditions of this renewed permit contain clear language expressly stating the Tier A municipality is required to perform stormwater management reviews even if a separate permit is required by the Department for the same or similar activity and that all individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality must complete the Department approved Stormwater Management Design Review Course. The proposed language is an iterative step that will make reasonable progress towards improving water quality.

In addition, and as described in **Response 2**, the Department is engaged in an assessment of and improvements to its municipal stormwater program which includes efforts to better gauge the effectiveness and enforcement of the MS4 program. These efforts include development of a new Supplemental Questionnaire relative to the annual report form as well as a stormwater audit process intended to provide focused compliance assistance to municipalities. These efforts will provide a platform for discussion between municipalities and Department staff to foster an adaptive approach to municipal stormwater management planning. Stormwater materials are posted at www.nj.gov/dep/dwq/msrp_home.htm and www.nj.gov/dep/dwq/msrp-archive.htm. The Department is confident that these efforts will translate to improved compliance.

No changes have been made to the final permit as a result of this comment.

150. **Comment:** Commenter 15 expresses general support for Part IV.B.5.e (Stormwater Management Design Review Training) and Part IV.B.5.f (Municipal Board and Governing Body Member Related Training) which require increased training for design, municipal, and other review engineers as well as training for municipal board and council member on the

stormwater management rules. However, since the two day Stormwater Management Rules and BMP Manual Course is only offered annually by the Department, some design engineers, municipal engineers, and other individuals may go without training for nearly an entire year if they have recently missed the previous class. As such, Commenter 15 recommends that Part IV.B.5.e be amended to include the additional requirement that untrained individuals who will not be attending the two-day course within 3 months of the EDPA must watch the five videos in the Stormwater Management Rule Video Series available at www.njstormwater.org/training.htm. Commenter 15 also states that the annual certification process be amended to require that the Stormwater Coordinator ensures compliance with this additional training requirement. Commenter 15 further recommends that the Department require individuals watching the online videos to take a test or quiz afterward to ensure that they actually watched the video.

Regarding Part IV.B.5.f, Commenter 15 states that the type of training that municipal board and council members must undertake, after they have performed their initial training, must be more specific. As the language now stands, after the initial training, successive training is required once per term of service thereafter from “at least of one of the tools offered under Post-Construction Stormwater Management found at the website above.” Commenter 15 states that as written, this training requirement could be satisfied by watching only the shortest video in the Stormwater Management Rule Video Series. Commenter 15 suggests that Part IV.B.5.f. specify the successive training that municipal board and council members must undertake. For example, the language could be amended to require that a member’s successive training can be satisfied by either watching the entire “NJPDES Municipal Stormwater Regulation Program Employee Training Videos” or the entire “Stormwater Management Rule Video Series (2015).” [15]

Response 150: Part IV.B.5.e is excerpted in **Response 148.** The Department does agree that the availability of the Department’s two day Stormwater Management Design Review Training (see www.nj.gov/dep/stormwater/training.htm) is important. In fact, that Department intends on continuing to offer this course on a more frequent basis and in larger venues to maximize the number of stormwater management reviewers that can be trained each year. Those who are not able to enroll in the course have been and will continue to be advised of the location of the training videos. Reviewers have also been encouraged to contact the Department for assistance in reviewing stormwater management designs. Because this course is offered on a more frequent basis than annually, the Department does not agree that the suggestions included in this comment are needed. In addition, the Department does not agree that the Stormwater Coordinator should be required to take this course as the intended purpose of this course does not necessarily align with the direct responsibilities for the Stormwater Coordinator (as defined at Part IV.F).

Regarding the second portion of this comment, note that Part IV.B.5.f is stated as follows:

“f. **Municipal Board and Governing Body Member Related Training:** The Tier A Municipality shall ensure that municipal board and governing body members that review and approve applications for development and redevelopment projects, complete the “Asking the Right Questions in Stormwater Review Training Tool” posted at

www.nj.gov/dep/stormwater/training.htm. This includes those individuals that review any projects for compliance with Part IV.B.4 (Post Construction) of this permit. Training must be completed by current municipal board and governing body members on or before EDPA + 6 months and by new members within six months of commencing duties. Once per term of service thereafter, municipal board and governing body members must review at least one of the tools offered under Post-Construction Stormwater Management found at the website above. The Tier A Municipality is required to maintain a list of the dates and names of training program participants in its SPPP.”

As acknowledged in this comment, these training requirements are new and represent an iterative step forward. The Department does not agree that it is necessary to mandate such prescriptive requirements as suggested in this comment. In fact, the Department asserts that most board and council members are volunteers who are actively involved in their communities and already have expressed an interest in viewing the training videos on their own time, to better serve their constituents.

No changes have been made to the final permit as a result of this comment.

151. **Comment:** Commenter 6 suggests that a tracking mechanism be developed for the training that is required by the permit. This will allow boards and commissions, which do have to take training as part of municipal land use, the ability to better track training requirements and will also allow the Department to easily track who has taken the training. Commenter 6 suggests development of an online database which would enable municipalities to access any certificates for printing so that they can be kept on site in a book. [6]

Response 151: The Department has already required a tracking requirement for training since the annual certification process requires Stormwater Coordinators to ensure compliance with the training requirement. As stated on Page 6 of Attachment A under the Measurable Goal for Part IV.B.5.e (Stormwater Management Design Review Training):

“Certify in each annual report that individuals reviewing projects have completed the required training, and maintain a list of the names and dates that individuals received training. This list shall be kept in the SPPP.”

Additionally, as stated on page 6 of Attachment A under the Measurable Goal for Part IV.B.5.f (Municipal Board and Governing Body Training):

“Certify in each annual report that municipal board and governing body members have completed the necessary training, and maintain a list of the names and dates that individuals completed training. This list shall be kept in the SPPP.”

No changes have been made to the final permit as a result of this comment.

152. **Comment:** Regarding smaller MS4s subject to the Tier B MS4 NJPDES permit, Commenter 15 states that this permit should equally require Tier B Municipalities to conduct training of

municipal employees, and particularly, training of engineers and council members regarding post-construction design standards. That training is no less important in smaller MS4s, where engineers and council members are required to apply the very same design standards. While the Tier B MS4 NJPDES permit includes a new “stormwater training component” action in the points system for the public education and outreach SBR, it would not be a mandatory requirement for all Tier B Municipalities. Commenter 15 states that the Department should make such training obligatory under the Tier B MS4 NJPDES permit, as it is under Tier A MS4 NJPDES permit. [15]

Response 152: N.J.A.C.7:14A-25.8(a) which pertains to the Tier B Municipal Stormwater General Permit is stated as follows:

“(a) Each municipality that is assigned to Tier B under N.J.A.C. 7:14A-25.3(a)2, and that operates a small MS4 that discharges to surface water or groundwater, shall apply for the Department’s Tier B Municipal Stormwater General Permit (Tier B Permit). The Department shall make this general NJPDES permit available to Tier B municipalities throughout the State. This general permit is not in any respect a permit under section 402 of the Federal Act (33 U.S.C. §1342).”

Because the Tier B MS4 NJPDES permit is a state requirement and not a federal requirement, the Tier B MS4 NJPDES permit requirements are a subset of the requirements of the Tier A MS4 NJPDES permit. As a result, the training requirement which stems from the federal requirement at 40 CFR 122.34 is not required for Tier B Municipalities. Note that Tier B Municipalities are generally located in more rural areas and in non-coastal regions that would otherwise be over-burdened by having to comply with the requirements placed upon Tier A Municipalities. Therefore, beginning with the 2004 Tier B MS4 NJPDES permit, the Department set forth just two SBRs for Tier B Municipalities namely Post Construction Stormwater Management in New Development and Redevelopment and Local Public Education. In the 2009 Tier B MS4 permit, the requirement for Local Public Education was modified to include a menu of options from which a Tier B municipality could choose. The Tier B MS4 NJPDES permit proposes an expansion of the above-mentioned requirements and provides incentives for training of stormwater management design reviewers and municipal board members. Despite not being required by the Tier B MS4 NJPDES permit, these changes are expected to result in an iterative step towards enhancing water quality.

With regard to the training of municipal employees, training videos and maintenance guidance are both readily available on www.njstormwater.org. However, the majority of the required employee training in the Tier A MS4 NJPDES permit focuses on specific tasks required to comply with Tier A SBRs that are not applicable to Tier B Municipalities. Requiring a Tier B Municipality to conduct annual training for its work force at the Tier A Municipality level would incur additional costs and place an unnecessary strain on its budget.

No changes have been made to the final permit as a result of this comment.

153. **Comment:** Regarding Part IV.B.5.e, Commenter 33 questions the use of the word “Design Engineers.” Commenter 33 questions if the intent was to include engineers retained in the capacity of designing the project or is this intended for those that review design? Commenter 33 suggests clarifying that “Design Engineers” means those that are engaged in the preparation of plans and calculations. [33]

Response 153: The intent of this requirement at Part IV.B.5.e, as excerpted in **Response 148**, is to include any person who reviews the stormwater management designs, including plans, calculations, groundwater recharge spreadsheets, soil testing data and maintenance schedules as submitted for municipal approval. Often these individuals are design engineering consultants whose firm is under contract with one or more municipalities to provide engineering design review services. Other individuals serving in this capacity are municipal employees from various departments, such as public works, administration, and engineering. The Department maintains that the requirement is clear as written.

No changes have been made to the final permit as a result of this comment.

154. **Comment:** Commenter 16 states that the requirement at Part IV.B.5.f for municipal board and council members to complete training within 6 months of permit issuance (and once per term of service, thereafter) will accomplish nothing but discourage individuals from volunteering their time making it more difficult to find qualified volunteers. Planning and Zoning Board members are currently required to take part in training under the New Jersey Planning Officials (NJPO) and this training should be incorporated into the existing training protocols. It should not be a separate requirement. [16]
155. **Comment:** Commenter 17 expresses concern regarding the requirement for municipal board and governing body member related training. Commenter 17 states that board members are volunteers and additional training extends the time commitment required to serve on volunteer committees. Commenter 17 states that boards and council members rely on their experts for guidance on stormwater matters. Commenter 17 suggests that the mandatory training law for New Jersey Planning and Zoning Boards be expanded to include any necessary stormwater training. [17]
156. **Comment:** Commenter 3 has concerns regarding Part IV.B.5.f which requires municipal board and governing body members to undertake training within five months of permit issuance. [3]
157. **Comment:** Commenter 29 expresses concern regarding the requirement for board and governing body members that review and approve development and redevelopment projects to complete the Department’s online interactive training. Commenter 29 states that while they appreciate the Department’s intent, the time commitment for volunteers is already significant. Commenter 29 states that the staff and experts that appear at board and governing body meetings provide the necessary acumen for reviewing the stormwater issues. [29]
158. **Comment:** Commenter 13 expresses concern regarding the requirement for all Municipal Land Use Board members as well as all governing body members to complete the Department’s

Municipal Board and Governing Body Member Related Training as hosted at the Department's website. Commenter 13 states that the reviews for project stormwater management are best left to the professionals retained by the Township, and by the Land Use Boards in the Township, to ensure compliance. Commenter 13 does not object to a separate proposal which requires mandatory stormwater management training periodically for all such professionals, which is of benefit to the municipality. Equally important issues in Land Use projects deal with traffic, parking, site lighting, landscape design, and they are reviewed by trained professionals retained by the Township. Township Council and Land Use Board members are all public servants who volunteer their spare time to serve the greater public and this proposed requirement will be burdensome to them if made mandatory. The training should be left as optional and available for those members who have an interest in the field and desire such training. [13]

Response 154-158: Part IV.B.5.f is excerpted in **Response 150**. Training has been a part of the Tier A MS4 NJPDES permit in every permit cycle renewal since the first Tier A MS4 NJPDES permit was issued in 2004. The Department maintains that this upgraded requirement will provide enhanced implementation of stormwater management system design review by local authorities. As such, this training constitutes an iterative step and reasonable progress towards the objectives of post-construction MS4 requirements which include increased recharge, reduced flooding and the reduction of the amount of pollutants discharged during storm events to the maximum extent practicable.

The Department's free video was created in response to the Federal requirement at 40 CFR 122.34(b)(6)(i) that the "program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance." This interactive video presentation was developed in cooperation with Rutgers University and is designed for ease of use by laypersons not specifically familiar with technical regulatory requirements. The video has a run time of approximately forty-five (45) minutes and can be viewed over any *Adobe® Flash®* enabled device, such as a desktop personal computer or tablet, at any time. The video can be viewed in one sitting, or the viewer may close the tool and resume at the same point later, on the same device, at his or her convenience.

Moreover, feedback provided to the Department from a recent course offered to those who review stormwater management designs for approval by Board and Governing Body members indicated that these design reviewers have found they often must explain basic stormwater management terms and concepts to the Board and Governing Body members. Additionally, recent reviews of projects approved by a sampling of municipalities revealed that many miss important design and performance standards of the stormwater management rule, indicating the Board members and experts alike need further training. Therefore, this brief, self-paced video presentation is an essential tool that will enhance implementation of local stormwater management design review and thereby assist municipalities in fulfilling post-construction MS4 permit requirements.

No changes have been made to the final permit as a result of this comment.

159. **Comment:** Commenter 15 states that Parts IV.B.4.d, IV.B.5.e and f of the permit must be accompanied by active and consistent enforcement efforts by the Department in order to achieve an adequate level of compliance with the post-construction stormwater requirements. Local governments rely heavily on property taxes as their primary source of revenue to fund local services. Commenter 15 contends that municipal board and city council members sometimes become more focused on the tax revenue a given project can generate rather than stormwater compliance for that property. Additionally, municipal officials sometimes view new regulatory or permitting obligations as burdensome and intentionally choose noncompliance in lieu of compliance, as they view noncompliance as the least expensive path forward.

Commenter 15 explains that one of the recommendations identified in the Delaware Riverkeeper Network's Hamilton Township Case Study (which evaluated twelve development projects for compliance with the applicable N.J.A.C. 7:8 standards) was to:

“[e]stablish a system to eliminate pressure on township review engineers to approve non-compliant stormwater systems . . . [because] [c]urrently, the pressure of maintaining an engineer's future ‘employability’ by the development community appears to influence review results.” (DRN Hamilton Case Study at 20.)

Commenter 15 states that consistent state enforcement efforts will help alleviate the pressure facing many municipal engineers. [15]

Response 159: The Department understands that, for various reasons, municipalities may not properly implement the post-construction stormwater management requirements. For this reason, the Department has included the requirement in Part IV.B.5.e for all individuals that review stormwater management designs to attend the twice annual Stormwater Management Design Review Course once every five years. This course covers all of the information that reviewers should need to review stormwater management designs in accordance with the Stormwater Management rules at N.J.A.C. 7:8. In addition, Part IV.B.6.f requires training for municipal board and governing body members with the intent of educating municipal officials on stormwater management so they can make informed decisions about development or redevelopment that is up for approval in their municipality.

To further address this issue, the Department has implemented a municipal stormwater program audit process. As stated on Page 57 of the Tier A MS4 NJPDES permit Fact Sheet:

“[T]he stormwater audit process will allow the Department to better evaluate municipalities' compliance with the requirements of the Tier A permit and identify areas of concern where municipalities can improve the implementation of their municipal stormwater management program.”

The Department expects that these efforts will be effective in ensuring that Tier A Municipalities better comply with the requirements in the Tier A MS4 NJPDES permit.

No changes have been made to the final permit as a result of this comment.

160. **Comment:** Commenter 22 questions whether the Department has adequate legal authority for Part IV.B.5.f. Commenter 22 states that some might consider the most specific statutory authority for this provision is N.J.S.A. 13:1D-9.h which authorizes the Department to “prescribe the minimum qualifications of all persons engaged in official environmental protection work.” Any authority that the Department may have for Part IV.B.5.f, however, is arguably preempted by the Municipal Land Use Law (MLUL) at N.J.S.A. 40:55D-23.3 which requires the Commissioner of Community Affairs to offer a basic course in land use law and planning for current and prospective members and alternate members of local planning boards, zoning boards of adjustment and combined boards. Commenter 22 explains that this course is to consist of no more than five hours of scheduled instruction; to be structured so that a member may satisfy this requirement within one calendar day; and to be developed in conjunction with the New Jersey Planning Officials.

In addition, the Department’s authority to impose Part IV.B.5.f on municipal governing body members is arguably further eliminated by the MLUL at N.J.S.A. 40:55D-23.4 which states, “The following persons shall be exempt from the educational requirements established pursuant to section 2 of P.L.2005, c.133 (C.40:55D-23.3): a. ... (2) A member of the governing body serving as a Class III member pursuant to section 14 of P.L.1975, c.291 (C.40:55D-23);.” This provision is evidence of legislative policy that at least for MLUL purposes, municipal governing body members shall not be subject to State-imposed training requirements.

Commenter 22 questions if whether the only way that the Department can legally bring about something resembling the mandatory training envisioned by Part IV.B.5.f is by persuading the Commissioner of Community Affairs to include this training in the “basic course” required under N.J.S.A. 40:55D-23.3. The Fact Sheet for the draft Tier A MS4 NJPDES Permit fails to briefly set forth, as significant legal considerations examined during preparation of the draft permit, a brief summary of the Department’s legal authority for Part IV.B.5.f. Specifically, neither Section 7.A.5.f nor any other section of this Fact Sheet makes any attempt to address the MLUL preemption concerns set forth above and in the corresponding portion, entitled “Municipal Board and Council Member Related Training.” These legal considerations must be analyzed by the New Jersey Attorney General’s Office and discussed in any final permit decision. [22]

Response 160: As discussed in **Response 154-158**, the Department maintains that the Municipal Board and Governing Body Member Related Training is consistent with the intent of 40 CFR 122.34(b)(6)(i) where the Department does not agree that such training needs to be incorporated into the “basic course” required under N.J.S.A. 40:55D-23. In fact, while the Department agrees with the statement in this comment that the Department is authorized by N.J.S.A. 13:1D-9.h to “prescribe the minimum qualifications of all persons engaged in official environmental protection work,” the Department adds the remainder of the citation, “and encourage and aid in coordinating local environmental protection services,” which is the basis for the development of the tool. Furthermore, the interactive video presentation is designed to supplement the training required of all Planning and Zoning Board Members which may not otherwise address these basic concepts of stormwater management, and it is not anticipated to be

an undue burden on anyone's time commitment. Additionally, other training videos are similarly available, via www.nj.gov/dep/stormwater/training.htm, for viewing at any time.

No changes have been made to the final permit as a result of this comment.

Attachment E – Best Management Practices for Municipal Maintenance Yards and Other Ancillary Operations

161. **Comment:** Commenter 22 states that any NJPDES permit that authorizes “stormwater discharge associated with industrial activity” must ensure that those discharges comply with N.J.A.C. 7:14A-24.9(a) and, where applicable, 40 CFR 122.44(i)(4). Accordingly, the “Inspect the entire site” provision in Attachment E of the Tier A MS4 NJPDES permit must be expanded to require the Tier A Municipality to “conduct an annual inspection” of the site to “identify areas contributing to a stormwater discharge associated with industrial activity [if any] and evaluate whether measures to reduce pollutant loadings identified” in the SPPP “are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed.” Commenter 22 continues by suggesting that the “Reporting Requirements” in Part IV.G.1 be expanded to require that the Annual Report summarize the result of this annual inspection. [22]

Response 161: The Department maintains that Attachment E as written already meets the requirements of N.J.A.C. 7:14A-24.9(a)2 since Attachment E requires monthly inspections. N.J.A.C. 7:14A-24.9(a)2i requires permittees to:

“...conduct an annual inspection of the facility to identify areas contributing to a stormwater discharge associated with industrial activity...and evaluate whether measures to reduce pollutant loadings identified in a stormwater pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit...”

N.J.A.C. 7:14A-24.9(a)2ii also requires permittees to “prepare a report summarizing the result of the annual inspection conducted under (a)2i above...”

Attachment E of the Tier A MS4 NJPDES permit requires monthly inspections of the entire site to “[I]dentify conditions that would contribute to stormwater contamination, illicit discharges or negative impacts to the Tier A Municipality’s MS4.” In addition, Attachments A and A-1 of the Tier A MS4 NJPDES permit state that the measurable goal for this section is to “Certify in each annual report that the SPPP includes all applicable requirements and that the requirements (including maintenance of inspection logs and tracking forms) of Attachment E have been met...” In sum, because permittees are required to perform monthly inspections as per Attachment E, the annual inspection requirements of N.J.A.C. 7:14A-24.9(a)2.i are already met.

No changes have been made to the final permit as a result of this comment.

162. **Comment:** Commenter 27 suggests that a section of Best Management Practice (BMP) recommendations be added to the permit (Attachment E) regarding the purchase and application

of road de-icers to minimize impacts to surface water, groundwater and biota. Commenter 11 references a recently released United States Geological Survey (USGS) study of streams in New Jersey from the 1970s through 2011 that has determined that chlorides from road salt has increased at all sites. (www.usgs.gov/news/40-year-trend-study-finds-signs-improved-water-quality-new-jersey-streams-0). [27]

Response 162: The Department disagrees with this comment. Application rates of de-icing material on roadways and parking lots are not the subject of the Tier A MS4 NJPDES permit but are under the purview of various publicly operated road departments and private contractors who conduct public safety operations during winter storm events. However, the Tier A MS4 NJPDES permit addresses the storage and handling of de-icing materials and rinsing of vehicles and equipment used in de-icing operations in Attachment E as entitled “Best Management Practices for Municipal Maintenance Yards and Other Ancillary Operations.” The Tier A MS4 NJPDES permit Attachment E requires municipalities to use BMPs to minimize or eliminate stormwater coming in contact with de-icing materials stored and handled in municipal maintenance yard operations.

No changes have been made to the final permit as a result of this comment.

Part IV.B, SBRs and Associated Conditions

6. MS4 Outfall Pipe Mapping and Illicit Discharge and Scouring Detection and Control, Attachment E (Tier A MS4 Permit only)

163. **Comment:** Commenters 5, 20 and 23 state that the requirement to investigate all of the Township's stormwater outfalls, despite the fact the municipality has not changed in character or scale since the results of the last investigation, will cost the municipality money. [5] [20] [23]
164. **Comment:** Regarding Part IV.B.6.a.iv which concerns the due date for Outfall Pipe Mapping, Commenter 33 states that a due date of Effective Date of Permit Authorization (EDPA) plus twelve (12) months is reasonable. [33]

Response 163-164: This comment refers to Part IV.B.6 which includes requirements that pertain to outfall pipe mapping (Part IV.B.6.a), stream scouring (Part IV.B.6.b), and illicit discharge detection and elimination (Part IV.B.6.c). The Department acknowledges the commenters' concern regarding costs but maintains that the investigations are necessary and in accordance with state and federal regulations. Pursuant to the NJPDES Rules at N.J.A.C. 7:14A-25.6(b)5.ii and N.J.A.C. 7:14A-25.6(b)6, and consistent with federal rule 40 CFR 122.34(b)(3) and 40 CFR 122.34(b)(6)(ii), municipalities are required to implement and enforce a program to detect and eliminate illicit connections to the permittees' MS4; develop and implement an operation and maintenance program that prevents or reduces the discharge of solid and floatable materials; and develop, update, and implement a program to detect, investigate and control any localized stream scouring from stormwater outfall pipes. 40 CFR 122.34(b)(3)(i)(A) specifically requires the Municipality to develop an outfall pipe map. As a result of these requirements, outfall pipes

owned or operated by the municipality must be mapped, and must be inspected at a minimum of once every five years.

Most of these activities are not new Tier A MS4 NJPDES permit requirements and date back to the initial 2004 MS4 NJPDES permit. Any changes to these requirements proposed in this Tier A MS4 NJPDES permit renewal are detailed beginning on page 33 of the draft Tier A MS4 NJPDES permit Fact Sheet. The most significant change (submission of the outfall pipe map to the Department) is fully addressed on page 37 of the Fact Sheet and can be satisfied, initially, by submitting the outfall pipe map prepared by the municipality as required by the 2004 Tier A MS4 NJPDES permit. Existing Tier A Municipalities are required to submit outfall pipe maps on or before EDPA + 12 months and New Tier A Municipalities are required to submit outfall pipe maps on or before EDPA + 36 months. Any new outfall points are to be provided to the Department annually thereafter. All Tier A Municipalities are required to submit an electronic version of the outfall pipe map by December 21, 2020.

The Department recommends that permit requirements pertaining to Part IV.B.6 Minimum Standards for MS4 Outfall Pipe Mapping, and Illicit Discharge and Scouring Detection and Control and Part IV.C.1 Minimum Standards for Stormwater Facilities Maintenance be met during a single inspection of each outfall owned or operated by the Tier A Municipality to save time and duplication of effort whenever feasible.

No changes have been made to the final permit as a result of this comment.

165. **Comment:** Commenter 27 suggests that a section be added within Part IV.B.6 (Minimum Standards for MS4 Outfall Pipe Mapping and Illicit Discharge and Scouring Detection and Control) and Attachment A to require owners of stormwater outfalls to post advisory signs on outfalls discharging by surface water used for primary and secondary contact recreational activities. [27]

Response 165: As stated in **Response 100**, the Department disagrees with this suggested permit change. Any advisory signs to caution swimmers against swimming near stormwater outfalls should be based on site-specific information and water quality data. Beach monitoring is performed under the Cooperative Coastal Monitoring Program as administered by the Department with the participation of local environmental health agencies (see www.nj.gov/dep/wms/bmw).

No changes have been made to the final permit as a result of this comment.

166. **Comment:** Under Part IV.B.6, the Department has required municipalities to inspect all outfalls within five years. Commenter 18 questions why the table does not include this requirement as a measurable goal. [18]

Response 166: Part IV.B.6.b.i requires the inspection of each outfall pipe once every five years for localized stream scouring whereas Part IV.B.6.c.i requires inspection of each outfall pipe once every five years for dry weather flow or other evidence of illicit discharges. The

measurable goals associated with these permit conditions are included in Attachment A, Measurable Goals and Implementation Schedule for Existing Permittees, and Attachment A-1, Measurable Goals and Implementation Schedule for New Permittees. The Department agrees with this comment and has revised these tables to describe the measurable goal of inspection of all outfall pipes at least once every five years. The revisions are:

- At page 8 of Attachment A and page 9 of Attachment A-1, the first sentence under the Measurable Goal column for Part IV.B.6.b now reads: “Certify in each annual report that municipally owned outfall pipes have received the required visual inspection at least once every five years and maintain a log indicating the number and location of outfall pipes inspected, repairs prioritized, and repairs scheduled or performed.”
- At page 8 of Attachment A and page 9 of Attachment A-1, the first sentence under the Measurable Goal column for Part IV.B.6.c now reads: “Certify in each annual report that the municipality has developed a program to detect and eliminate illicit discharges and has conducted inspections required at Part IV.B.6.c at least once every five years.”

This change affects Attachment A and Attachment A-1 of the final Tier A MS4 NJPDES permit.

167. **Comment:** Regarding Part IV.B.6.b.i, Commenter 33 suggests that the once every “five years” be replaced with once every “year.” Similarly, regarding Part IV.B.6.c.i, Commenter 33 suggests that the once every “five years” be replaced with once every “year.” [33]

Response 167: Part IV.B.6.b concerns stream scouring where Part IV.B.6.b.i is stated as follows:

“i. Inspect each outfall pipe which discharges to a stream for localized stream scouring in the vicinity of the outfall pipe. Each outfall pipe shall be inspected at least once every five years;”

Part IV.B.6.c concerns illicit discharge detection and elimination where Part IV.B.6.c.i is stated as follows:

“i. Conduct visual inspection of outfall pipes owned or operated by the municipality at least once every five years to determine if dry weather flow or other evidence of illicit discharge is present;”

A prescriptive frequency of once every five years is an increase from the 2009 Tier A NJPDES permit, which required permittees to conduct an initial investigation of outfall pipes and maintain a program to detect and control localized stream scouring. The frequency of the Outfall Pipe Stream Scouring requirements align the physical inspection of the outfall pipes with the Illicit Discharge Detection and Control Program so that the Tier A Municipality could do both outfall pipe stream scouring detection and illicit discharge inspection on the same schedule. These changes constitute reasonable further progress toward reducing pollutants to the maximum extent practicable. Please see **Response 166** for additional measures that are required regarding these sections.

No changes have been made to the final permit as a result of this comment.

168. **Comment:** Commenter 18 recommends that the Department consider adding a measurable goal for outfall inspections required by Part IV.B.6.b.i (localized stream scouring) and Part IV.B.6.c.i (illicit discharge detection and elimination) to give municipalities a benchmark to measure against (and be held accountable to) as well as ensuring reasonable progress. Commenter 18 suggests that if all outfalls are to be inspected over the permit cycle, a reasonable goal would be 20% of outfalls annually.

Regarding Part IV.B.6.b.iii, Commenter 18 believes this provision would be strengthened by either specifying the circumstances under which corrective actions would be “feasible” or, alternatively, when they are not feasible. Commenter 18 states that as currently written, the permittee is given sole discretion to determine when it would be feasible to take corrective action, which will make compliance with this provision ambiguous, as well as enforcement of it. [18]

Response 168: Part IV.B.6.b.i requires Tier A Municipalities to inspect all outfall pipes for scouring at a minimum of once every five years. Any newly identified outfall pipes are required to be inspected immediately for scouring. Note that the 2009 Tier A MS4 NJPDES permit did not mandate a specific inspection frequency but rather the permittee was required to report the number of outfalls physically inspected each year on an annual basis. The Department maintains that inclusion of a specific frequency in this renewal permit provides an iterative step and reasonable progress towards reduced flooding and the reduction of the amount of pollutants discharged during storm events.

Additionally, Part IV.B.6.b.iii is a new requirement that obligates Tier A Municipalities to perform an investigation of the source of the localized stream scouring. Part IV.B.6.b.iii is stated as follows:

“iii. When localized stream scouring is detected, document sources of stormwater that contribute to the outfall pipes identified in i and ii, above. Each identified source shall be investigated; and (1) where identified sources are located on property owned or operated by the Tier A Municipality, corrective action to reduce stormwater rate or volume shall be taken by the municipality when feasible, or (2) where identified sources are within the jurisdiction of but not located on property owned or operated by the Tier A Municipality, the municipality shall ensure proper operation and maintenance of stormwater facilities located thereon pursuant to Part IV.C.1.b (Stormwater Facilities Maintenance), below;”

As specified in this permit condition, corrective action will not be feasible in all situations and factors which make the reduction of rate or volume of stormwater feasible will not be the same in all situations. It is possible that due to constraining factors, which may be unique to individual municipalities, it will not be possible to reduce the rate or volume of stormwater discharged from sources located on municipally owned property. An example of a situation where reducing the rate or flow of stormwater is not feasible is if the municipality has a contaminated site that is

undergoing remediation. As part of that remediation, the site may be capped with an impervious surface to prevent the flow of stormwater into the contaminated media below. In instances, such as this, the identified source must still be documented, and the detected, localized stream scouring must still be remediated.

The Department does not have the ability to identify all possible scenarios in which corrective action will be feasible and as such, has left the initial determination of feasibility to the Tier A Municipality. The Department will be able to review the documentation and reasoning for the feasibility determination if necessary. This requirement shows reasonable progress towards reducing localized stream scouring to the maximum extent practicable.

However, as a result of this comment, the Department has determined that a change is required to provide clarity to Part IV.B.6.b.iv of the Tier A MS4 NJPDES permit. Part IV.B.6.b.iv has been revised in the final permit as follows:

"iv. Prioritize, schedule and complete remediation of identified localized stream scouring, and take ~~corrective action to reduce the rate or volume of identified sources of stormwater contributing to scouring~~ based upon the requirements of Part IV.B.6.b.iii(1) and (2), above. If not completed, a schedule for completion shall be maintained as required in Part IV.C.1.a.iv (Stormwater Facilities Maintenance); and"

This change affects Part IV.B.6.b.iv of the final Tier A MS4 NJPDES permit.

169. **Comment:** Commenter 22 states that some requirements in Parts IV.B.6.b.iii and iv impose uncertain but potentially large new costs on the Tier A Municipality while achieving little or no additional control of localized stream scouring. Commenter 22 points to Part I.F.7.e of the current 2009 Tier A MS4 NJPDES permit, which requires repairs that have very limited geographic scope but generally solve the localized scouring problem. Specifically, Part I.F.7.e requires repairs solely of the "areas where localized stream and bank scouring occurs" (not elsewhere in the catchment area of the outfall pipe). Commenter 22 states that the additional Part I.F.7.e requirement that these repairs "shall be made in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey" (and the ongoing Part I.F.7.c requirement to maintain municipally operated stormwater facilities) should ensure that these repairs generally solve the localized scouring problem on a long-term basis.

In contrast, Part IV.B.6.b.iii sets forth the following new requirements identified as numbers (1) and (2) below:

- "ii. When localized stream scouring is detected, document sources of stormwater that contribute to the outfall pipes identified in i and ii, above. Each identified source shall be investigated; and:
- (1) where identified sources are located on property owned or operated by the Tier A Municipality, corrective action to reduce stormwater rate or volume shall be taken by the municipality when feasible, or

- (2) where identified sources are within the jurisdiction of but not located on property owned or operated by the Tier A Municipality, the municipality shall ensure proper operation and maintenance of stormwater facilities located thereon pursuant to Part IV.C.1.b (Stormwater Facilities Maintenance), below”

Commenter 22 states that Part IV.B.6.b.iv includes a new requirement to “take corrective action to reduce the rate or volume of identified sources of stormwater contributing to scouring” (and also essentially continues the current 2009 Tier A MS4 NJPDES permit requirement to remediate identified localized stream scouring). Presumably, this new “reduce the rate or volume” requirement is limited to “identified sources ... located on property owned or operated by the Tier A Municipality” as specified in Part IV.B.6.b.iii. These sources presumably include, for example, all streets that are owned or operated by the Tier A Municipality and in the catchment area of the outfall pipe.

For these sources, Commenter 22 states that there is much room for argument about how much the Tier A Municipality must reduce stormwater rate or volume, and about how to determine whether and how much such reduction is “feasible.” But the more fundamental issue is that if the Tier A Municipality remediates identified localized stream scouring, as required by Parts IV.B.6.b.iv and 6.b.v, and if such remediation accommodates existing and projected stormwater flows, then requiring the Tier A Municipality to reduce stormwater rate or volume will require the municipality to incur costs and achieve little or no additional control of localized stream scouring,

For identified sources not located on property owned or operated by the Tier A Municipality, the fundamental issue is similar. If the remediation of localized stream scouring meets Parts IV.B.6.b.iv and 6.b.v and accommodates existing and projected stormwater flows, then requiring the Tier A Municipality to ensure proper operation and maintenance of stormwater facilities on non-municipal property will require the municipality to incur costs and achieve little or no additional control of localized stream scouring. Indeed, some kinds of improper operation and maintenance of stormwater facilities do not contribute in any way to localized stream scouring. [22]

Response 169: The Department disagrees with the comment. The 2004 Tier A MS4 NJPDES permit and subsequent 2009 Tier A MS4 NJPDES permit required each municipality to complete an initial physical inspection of all its outfall pipe ends and maintain a stormwater outfall pipe scouring detection, remediation and maintenance program to detect and control localized stream scouring. Incidences of localized stream scouring were to be identified, repairs were to be prioritized, and scheduled remediation was to be completed.

Part IV.B.6.b of the Tier A MS4 NJPDES permit takes iterative steps by requiring municipalities to inspect their outfall pipe ends once every five years for signs of localized stream scouring yet also specifies follow up requirements. Where incidences of localized stream scouring have been identified, municipalities are required to investigate and identify the sources of stormwater contributing to the scouring (e.g. interconnected MS4s, increase in impervious pavement), and to

prioritize the remediation of the localized stream scouring. When the source of scouring is identified as originating on municipal property, corrective action to reduce stormwater flow rate or volume from the source is to be taken if feasible. If corrective action on municipal property is not feasible, the identified source must still be documented, and the localized stream scouring must be remediated. When the source of scouring is identified as originating on private property within the jurisdiction of the municipality, the identified source must be documented, and the localized stream scouring must be remediated. If the source of scouring is a privately-owned stormwater facility, the municipality must ensure the proper operation and maintenance of the private stormwater facility by the owner-operator.

Because stream scouring is caused by excessive stormwater flow rate, addressing the sources of stormwater is often a more effective long-term solution than only remediating the scouring. Remediation measures often require long-term maintenance similar to other stormwater facilities. Addressing the sources of stormwater can often reduce the required maintenance as well as reduce future stream scouring and is an improvement over the 2009 Tier A MS4 NJPDES permit requirements. In addition, the Department did clarify Part IV.B.6.b.iv of the Tier A MS4 NJPDES permit as noted in **Response 168**. Therefore, the Department maintains that the terms and conditions in the Tier A MS4 NJPDES permit constitute reasonable further progress toward the standard of reducing the discharge of pollutants to the maximum extent practicable.

No changes have been made to the final permit as a result of this comment.

170. **Comment:** Regarding Part IV.B.6.c, Commenter 18 states that the municipality's requirements to develop procedures for trackdown, elimination and complaint investigation are not clear, although the Department has specified minimum requirements. Commenter 18 also states that it is not clear if the municipality is required to document its procedures for each of the requirements outlined in this subsection. Commenter 18 does acknowledge that Part IV.F.1.a.iii states that the written SPPP shall describe the measures necessary for compliance with all components of the Tier A MS4 NJPDES permit including all measures described in Part IV.B, C, D and E above.

Commenter 18 recommends that the Department underscore the importance of developing procedures for trackdown and elimination of illicit connections, as well as complaint response in this section of the permit. Regarding Part IV.B.6.c.ii, iv, v, and vi, Commenter 18 believes that these sections should include deadlines and/or timing considerations so as not to leave permittee compliance open ended. [18]

Response 170: The Department agrees with the suggestion in this comment and recognizes the importance of regular inspections and documentation. The language in Part IV.B.6.c has been revised as follows:

“c. Illicit Discharge Detection and Elimination: The Tier A Municipality shall develop, update, implement and enforce an ongoing Illicit Discharge Detection and Elimination Program in accordance with this permit. This program shall be documented in the written SPPP, as required in Part IV.F.1.a.iii (SPPP). See the Tier A Municipal Guidance document

(www.nj.gov/dep/dwq/tier_a_guidance.htm) for specific measures. See also EPA Guidance at www3.epa.gov/npdes/pubs/ndde_manualwithappendices.pdf. The Tier A Municipality shall, at a minimum.”

To be consistent with the Measurable Goal stated in Attachments A and A-1 of the permit, the language in Part IV.B.6.c.iv has been revised as follows:

- iv. “Document investigations and actions taken using the Department’s Illicit Connection Inspection Report Form. See www.nj.gov/dep/dwq/tier_a_forms.htm,”

The revision also clarifies that the municipality must use the Illicit Connection Report Form for every outfall pipe illicit connection investigation.

This change affects Part IV.B.6.c and Part IV.B.6.c.iv of the final Tier A MS4 NJPDES permit.

171. **Comment:** Regarding Part IV.B.6.c, Commenter 14 states that the Department has worked with various entities (e.g., Ocean County Utilities Authority, Ocean County Health Department, Ocean County Planning Department, N.J. Environmental Infrastructure Trust, Beachwood) to track the sources of and address some pathogen and other storm water problems. This local partnership in the Barnegat Bay recognized the importance of regular inspection, maintenance, and follow-up to identify and address problems and to ensure that progress was being achieved. Commenter 14 encourages the Department to require development of municipal schedules for dry weather inspection of all outfall pipes within a specified time period (e.g., 3 to 5 years); development of established procedures for complaint investigation; and a municipal plan for prioritization and schedule of corrective actions. Establishment of such schedules would help speed up identification of problems to the Department, and ultimately better protect public health. [14]

Response 171: The Department recognizes the importance of regular inspections of outfall pipes for illicit connections and localized stream scouring and has purposefully improved and clarified this section of the Tier A MS4 NJPDES permit. Part IV.B.6 requires Tier A Municipalities to inspect every outfall pipe that they own or operate once every five years for illicit connections and localized stream scouring. This requirement represents an increase from the 2009 Tier A MS4 NJPDES permit, which required an initial inspection of the outfall pipes and investigation of any complaints of a possible illicit connection. This Tier A MS4 NJPDES permit is also more prescriptive in that if an illicit connection is found, the Tier A Municipality is required to investigate and eliminate it within one year in accordance with Part IV.B.6.c.iii as described in **Response 173**. Additionally, Part IV.B.6.vii requires Tier A Municipalities to investigate complaints and reports of illicit connections within three months of a complaint as described in **Response 175**. The Department maintains that these strengthened requirements will lead to improved water quality.

Please refer to **Response 173** and **Response 175** for changes to Part IV.B.6 in the final Tier A MS4 NJPDES permit that relate to this issue.

172. **Comment:** Regarding Part IV. B.6.c.i, Commenter 18 recommends that the Department consider strengthening this permit condition by stating that the Tier A Municipality must “Conduct visual dry weather inspections of outfall pipes owned or operated by the municipality at least once every five years to determine if dry weather flow or other evidence of illicit discharge is present.” Commenter 18 states that by requiring inspections to be done during dry weather, it underscores the importance of planning inspections so that municipalities are inspecting during dry weather events. Commenter 18 also recommends that the permit include a definition for “dry weather flow” as referenced in the Tier A Municipal Guidance document.

Also, regarding Part IV.B.6.c.i, Commenter 18 recommends that the Department consider that SPPPs include field screening methods (e.g. ammonia strips, pH strips, conductivity, optical brighteners, etc., and laboratory sampling), if needed, to properly characterize a dry weather discharge. [18]

Response 172: The Department agrees with the first part of this comment. As a result, the following change has been made to Part IV.B.6.c.i of the final Tier A MS4 NJPDES permit:

- “i. Conduct visual dry weather inspection of all outfall pipes owned or operated by the municipality at least once every five years to determine if dry weather flow or other evidence of illicit discharge is present. Dry weather flow is flow occurring 72 hours after a rain event.”

The Department disagrees with the suggestion in the second part of this comment, namely to revise Part IV.B.6.c.i of the Tier A MS4 NJPDES permit. Part IV.B.6.c.iv requires that all dry weather flow investigations be documented on the Department’s Illicit Connection Inspection Report Form (see www.nj.gov/dep/dwq/tier_a_forms.htm). This form requires physical observations and an analysis of dry weather outfall flow samples where that flow is suspected to be from an illicit connection. However, The Department will consider adding other appropriate field screening measures to its Tier A Municipal Guidance document.

This change affects Part IV.B.6.c.i of the final Tier A MS4 NJPDES permit.

173. **Comment:** Part IV.B.6.c.iii requires the elimination of non-stormwater discharges that are traced to their source and found to be illicit connections. Commenter 18 suggests adding a “not to exceed” timeframe of one year for municipalities to eliminate illicitly-connected non-stormwater discharges, from the date of detection of an illicit discharge. [18]

Response 173: The Department agrees that Part IV.B.6.c.iii should have a prescriptive timeline and has determined that one year is a reasonable timeframe. This change ensures consistency with 40 CFR Part 122.34(a) which requires permit requirements that are “expressed in clear, specific, and measurable terms,” Part IV.B.6.c.iii is revised as follows:

- “iii. Eliminate, within one year of discovery, non-stormwater discharges that are traced to their source and found to be an illicit connection.”

This change affects Part IV.B.6.c.iii of the final Tier A MS4 NJPDES permit.

174. **Comment:** Commenter 33 suggests that the addition of the words "including unintentional ground water infiltration" to Part IV.B.6.c.i. [33]

Response 174: Part IV.B.6.c.i is stated as follows:

"i. Conduct visual inspection of outfall pipes owned or operated by the municipality at least once every five years to determine if dry weather flow or other evidence of illicit discharge is present;"

The Department disagrees with this suggested change to add the phrase "including unintentional ground water infiltration." Inclusion of this phrase would be inconsistent with Part II.A.2.b.ii of the Tier A MS4 NJPDES permit since uncontaminated ground water (e.g. infiltration) is an eligible non-stormwater discharge. This is consistent with 40 CFR 122.34(b)3.ii, which states:

"The permit must also require the permittee to address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if the permittee identifies them as a significant contributor of pollutants to the small MS4: Water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration..."

No changes have been made to the final permit as a result of this comment.

175. **Comment:** Commenter 18 suggests that Part IV.B.6.c.vii be revised to add a "not to exceed" timeframe of three months for municipalities to investigate complaints and reports of illicit connections, from the date they receive such a complaint/report. [18]

Response 175: The Department agrees with this comment. Consistent with the requirement of 40 CFR Part 122.34(a) to include permit requirements that are "expressed in clear, specific, and measurable terms," Part IV.B.6.c.vii is revised as follows:

vii. "Investigate, within three months of receipt, complaints and reports of illicit connections, including those from operating entities of interconnected MS4s."

This change affects Part IV.B.6.c.vii of the final Tier A MS4 NJPDES permit.

Part IV.C, Other Control Measures

1. Minimum Standards for Stormwater Facilities Maintenance (Tier A MS4 NJPDES Permit only)

176. **Comment:** Regarding Part IV.C.1.a, Commenter 18 recommends that the Department require the development of a stand-alone inventory of municipally owned and operated stormwater facilities. Commenter 18 states that this universe should be separate from the maintenance log and inspection records as it will serve as a tool to identify when, if, and how work was done. The

Tier A MS4 NJPDES permit Fact Sheet references an inventory in multiple locations as well as the Department's Annual Report that is already in use.

Similarly, regarding Part IV.C.1.b, Commenter 18 recommends that the Department require the development of a stand-alone inventory of all stormwater facilities (constructed after February 7, 1984) not owned or operated by the Tier A Municipality. Development of this universe will help facilitate the Municipality's ability to readily identify its universe and will allow the Department to cross check maintenance logs against the inventory to determine the Tier A Municipality's oversight of its program. [18]

177. **Comment:** Commenter 14 encourages the Department to require the development of a stand-alone inventory of all storm water facilities not owned or operated by municipalities. Development of this inventory will help facilitate the municipality's ability to readily identify its responsibilities and simplifies the Department's ability to cross check maintenance logs against the inventory to assess a municipality's oversight of its responsibilities.

Commenter 14 also expresses support for the Department in taking the lead in developing a mobile friendly application for mapping and collecting information on the various components of stormwater facilities. Commenter 14 states that making it easier for municipalities to collect and submit their data will lead to increased levels of compliance with the regulations and, by extension, to enhanced water quality protection. [14]

178. **Comment:** Commenter 6 states that the map and inventory requirements as included in the preliminary draft MS4 permit should be reinstated in the permit. The inventory is very helpful and would be very useful for municipalities to be able to identify what stormwater infrastructure they have so that they can then address it. Commenter 6 also states that the mapping and inventory is essential for green infrastructure projects because drainage area is needed for determining green infrastructure. [6]

Response 176-178: The inclusion of Minimum Standards for Stormwater Facilities Maintenance, including the requirement to document specific location information for stormwater facilities or structural BMPs, is a primary focus of the Tier A MS4 NJPDES permit for this renewal cycle. To help promote long-term maintenance of BMPs, this Tier A MS4 NJPDES permit specifies and clarifies maintenance requirements related to stormwater facilities that are municipally owned (Part IV.C.1.a) and stormwater facilities not owned or operated by the municipality (Part IV.C.1.b). Without an accurate inventory of stormwater facilities, the Tier A Municipality cannot ensure that adequate inspections, maintenance, and other needed follow-up are performed to ensure proper operation and maintenance. These changes also require the municipality to maintain a log which is stated at Part.IV.C.1.a.ii for municipally owned facilities as follows:

- “ii. The Tier A Municipality shall maintain a log sufficient to demonstrate compliance with this section; including but not limited to the stormwater facility inspected, location information of the facility inspected (location information must be specific enough to locate and identify the stormwater facility in the field; e.g. geographic coordinates), name of inspector, date of

inspection, findings, and any preventative and corrective maintenance performed. Example Maintenance Logs and Inspection Records forms which are sufficient to demonstrate compliance with this section are available at www.nj.gov/dep/stormwater/maintenance_guidance.htm.”

A similar requirement is included at Part.IV.C.1.b.ii that pertains to the required program for facilities not owned or operated by the municipality.

As described in further detail in **Response 184**, the requirement for municipalities to maintain publicly owned stormwater facilities (Part IV.C.1.a) and the requirement for municipalities to oversee a program to maintain privately owned stormwater facilities (Part IV.C.1.b) is not new to this permit cycle. However, the Department agrees that the permit requirement for municipalities to have or ensure collection of locational data through an inventory and log is more clear in this renewal permit. The Department maintains that many municipalities likely have an inventory in some format already in place to assure compliance with these maintenance requirements as included in the 2004 and 2009 Tier A MS4 NJPDES permits.

As described in **Comment 178** above, a requirement to inventory and map stormwater facilities was included in Part IV.C.1 and 2 of the preliminary draft Tier A MS4 NJPDES permit which was released prior to the issuance of the draft Tier A MS4 NJPDES permit. The Department considered all comments that were submitted in response to the preliminary draft permit and incorporated certain changes to the requirements of Part IV.C (Other Control Measures). Specifically, the Department determined it best to allow the municipality to comply with this condition using a variety of methods or means. The Department encourages all municipalities to go beyond the Tier A MS4 NJPDES permit requirements and create a stormwater facility inventory to assist them in meeting requirements associated with post construction stormwater facility operation and maintenance. As described in **Response 31**, the Department is developing a “MS4 Inventory & Mapping” mobile device application (app) for field use on personal handheld devices such as a smartphone, Android, iPhone, BlackBerry or iPad. In addition, a current stormwater inventory will assist in compliance with permit requirements regarding illicit discharge track down and elimination, scouring detection and control, employee training about stormwater system maintenance and control of solid and floatable materials.

No changes have been made to the final permit as a result of these comments.

179. **Comment:** Commenter 4 states that the MS4 mapping has increased where it is required to be provided in GIS digital format. Although this proposal is laudable and prudent in the long term, Commenter 4 states that a uniform collection and mapping format has not been provided. Assistance to meet this goal could be provided, perhaps with shareable Global Positioning System (GPS) mapping equipment. [4]
180. **Comment:** Commenter 17 states that while the Department is in the process of developing an application for the purposes of collecting data to develop, update and maintain an inventory of private stormwater facilities, their municipality would be required to have an Arc GIS On-Line

license which is expensive and must be renewed annually for each device. This method will be cost prohibitive both from a technology and staffing basis. [17]

181. **Comment:** Commenter 16 states that the mapping requirements cannot easily be done by the same individuals who are periodically maintaining the basins. Department of Public Works maintenance personnel are not trained in the use of a GPS data collector and may not have the technical background to perform this task. Commenter 16 questions if the Department is assuming that the municipality has the resources to train individuals in the use of this evolving technology.

Commenter 16 asks the Department to confirm that if "geographic coordinates" are used, they need not be collected in accordance with N.J.A.C. 7:1D-Appendix A. Commenter 16 explains that in order to download data from GPS collection devices, municipalities may have to purchase "seats" for ArcMap software, which can cost thousands of dollars. [16]

Response 179-181: Part IV.C.1 does not require a comprehensive, electronic inventory or a map of stormwater infrastructure as stated in **Comments 179, 180, and 181** above. Rather, this permit condition requires the collection of location information during the routine process of maintaining logs of required maintenance activities. This allows permittees to collect location information over time while performing the maintenance activities that have been required by MS4 NJPDES permits since 2004. The permit does require location information to be specific enough to locate and identify stormwater facilities in the field, but does not specify a method of collecting this information. As stated on page 42 of the Tier A MS4 NJPDES permit Fact Sheet, the Department encourages municipalities to use modern data collection techniques and the Department has developed a number of tools including a template for use with handheld GPS data collection devices. These are provided in several formats including Microsoft Excel, ArcGIS Desktop, Trimble Handheld GPS, and ArcGIS Online. ArcGIS Online is the easiest tool to learn and is a cell phone or tablet based tool that can be accessed at any time using a mobile data connection or by downloading the tool over a Wi-Fi connection prior to conducting field data collection. Because the Department understands that not all permittees have experience with handheld GPS units or have access to such units, the Department is offering a variety of tools to satisfy the wide range of experience and capability of permittees. The Department will be conducting free regional training sessions centered on how to use the provided mapping and inventory tools. The Department is also willing to conduct one on one training sessions with permittees, if requested.

The Tier A MS4 NJPDES permit does not require that geographic coordinates be collected in accordance with N.J.A.C. 7:1D-Appendix A as questioned in **Comment 179**. However, as discussed above, the Department is providing guidance on suggested geographic coordinates standards and collection methods. The Department will be providing ArcGIS Online seats (licenses) at no cost to permittees to help offset the cost of utilizing modern methods of collecting location information if a municipality chooses to use such methods to comply with Part IV.C.1.

Municipalities are also encouraged to explore both commercial and public resources for data collection and management. This could include sharing equipment and resources with other municipalities. Other public agencies, such as the New Jersey Highlands Council and the Department are developing standardized techniques for stormwater facility inventory locational data collection and management.

Municipalities may also be able to obtain stormwater facility locational information already collected by these and other public organizations. For example, the New Jersey Hydrologic Modeling Database (or H&H Database) is posted on line and encompasses several decades of data collection by NJ Soil Conservation Districts and the New Jersey Department of Agriculture. This database contains a wealth of information regarding stormwater management basins and data can be downloaded based on location. See <https://hydro.rutgers.edu> to view the database map or https://hydro.rutgers.edu/public_data/ to download data in an Excel format. The information in this database may help municipalities to identify stormwater basins within their municipality. This will help to identify basins that may require maintenance, and can help the municipality to develop a more robust inventory as a result.

No changes have been made to the final permit as a result of these comments.

182. **Comment:** Commenter 11 asks that “stormwater facilities” be defined in the context of the stormwater facility log.

Commenter 11 also asks that the Department include the language “which are approved by the Tier A Municipality under Part IV.B.4 (Post Construction Stormwater Management in New Development and Redevelopment) after EDPA” in this part as it is included in Parts IV.C.1.a.iii and v of the Preliminary Draft Tier A MS4 NJPDES permit. Commenter 11 states that by not including this limiting language, this part will impose an extremely heavy burden on their municipality in determining where such facilities have historically been incorporated on properties not owned by the municipality. [11]

Response 182: As defined in Notes and Definitions, Part IV.B.1.r, the definition of stormwater facility is as follows:

“r. “Stormwater facility” includes, but is not limited to: catch basins, detention basins, retention basins, filter strips, riparian buffers, infiltration trenches, sand filters, constructed wetlands, wet basins, bioretention systems, low flow bypasses, and stormwater conveyances. Stormwater facilities include structural stormwater management measures.”

This is the definition of stormwater facilities that should be utilized for the purposes of creating a log.

With regard to the second portion of this comment, a preliminary draft version of the Tier A MS4 NJPDES permit did contain specific language regarding Minimum Standards for Stormwater Facilities as well as Minimum Standards for Stormwater Facilities Mapping where that specific language was not carried through in the draft MS4 NJPDES permit. As noted in this comment,

inventory and mapping requirements for “Subsurface infiltration/detention systems” and “Green infrastructure” in the preliminary draft permit were limited to those systems approved after EDPA meaning that the requirement would not take effect until this subject Tier A MS4 NJPDES permit is approved. As described in **Response 179-181** above, the Department did not include such prescriptive inventory and mapping requirements in the draft Tier A MS4 NJPDES permit and did not distinguish different start dates for inventory requirements for different stormwater facilities. Note that “Subsurface infiltration/detention systems” and “Green infrastructure” are relatively new stormwater management devices and it is most likely that there are records of any installations.

No changes have been made to the final permit as a result of this comment.

183. **Comment:** Commenter 15 states that Part IV.C.1 contains no measurable requirements and suggests that permittees be required to develop a stormwater facilities inventory and map. Commenter 15 also states that Part IV.C.1 contains no measurable requirements and states only that the permittee “shall ensure that stormwater facility maintenance is performed pursuant to any maintenance plans, or more frequently as needed.” Commenter 15 states that in order to meet the “clear, specific, measurable” standard, the permit would need to require a measurable component, such as a minimum frequency of maintenance inspections and/or operations. As written, permittees could implement this requirement with maintenance protocols of widely varying effectiveness; thus, it fails to ensure that permittees are in fact meeting the MEP standard. [15]

Response 183: See **Response 179-181** above regarding mapping and inventory. Regarding maintenance, Part IV.C.1 has more detailed requirements in the related subsections at Part IV.C.1.a.i to iv, Part IV.C.1.b.i to ii, and Part IV.C.1.c to d which clearly describe the minimum standards for stormwater facility maintenance that a municipality must follow. These subsections also refer to the Department’s maintenance guidance, which provides clear and measurable maintenance goals, minimum frequencies of maintenance, descriptions of preventive and corrective maintenance actions, and inspection forms and logs for each type of stormwater management facility. Therefore, Part IV.C.1 of the Tier A MS4 NJPDES permit has met the federal requirements to include clear, specific, and measurable permit requirements.

No changes have been made to the final permit as a result of this comment.

184. **Comment:** Commenter 15 states that Part IV.C.1.a and b have been improved as compared to the current 2009 Tier A MS4 NJPDES permit, but they must be strengthened even further to guarantee that all facilities are maintained and functioning as designed. While the 2009 Tier A MS4 NJPDES permit required only that MS4s “[e]nsure adequate long-term operation and maintenance of BMPs,” with no further detail, the draft permit now proposes to require that stormwater facility maintenance is “performed pursuant to any maintenance plans, or more frequently as needed, to ensure the proper function and operation of the stormwater facility,” and to require that MS4s “maintain a log sufficient to demonstrate compliance with this section” (with a list of specific information to be logged).

Commenter 15 continues by stating that the draft permit requires inspections for municipally owned or operated facilities (but not privately owned facilities). Based on this language it appears that the Department does intend for permittees to develop and implement meaningful maintenance plans and programs; however, Commenter 15 expresses concern that this proposed language leaves too much discretion for permittees to decide on their own maintenance enforcement activities. Commenter 15 suggests that this language be tightened to set out clear instructions for the steps that municipalities must take to ensure that facilities are maintained. As an example, Commenter 15 states that the Department should explicitly state that maintenance plans are required for all regulated major development pursuant to N.J.A.C. 7:8-5.8, so that MS4 permittees understand the applicability of this regulatory requirement. Commenter 15 states that EPA recommended such a provision in its 2014 permit review:

“EPA recommends permits require operation and maintenance plans to be submitted and approved with new private BMPs. . . In many cases, controls may be located on private property, and it is necessary to establish some provision to assure responsibility and accountability for the operation and maintenance of these controls.” (EPA Permit Review at 14) [15]

Response 184: Part IV.C.1.a and Part IV.C.1.b of the Tier A MS4 NJPDES permit require the permittees to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities. Part IV.C.1.a applies to all municipally owned or operated stormwater facilities whereas Part IV.C.1.b applies to stormwater facilities not owned or operated by the Tier A Municipality. Part IV.C.1.a.i requires:

“...inspection and maintenance must be performed pursuant to any maintenance plans, or more frequently as needed, to ensure the proper function and operation of the stormwater facility...”

Similarly, Part IV.C.1.b.i of the Tier A MS4 NJPDES permit requires:

“...shall ensure that stormwater facility maintenance is performed pursuant to any maintenance plans, or more frequently as needed to ensure the proper function and operation of the stormwater facility...”

In accordance with Part IV.B.1.g, “maintenance plan” is defined as:

“...a maintenance plan pursuant to N.J.A.C. 7:8-5.2(b) and 5.8 prepared by the design engineer for the stormwater management measures incorporated into the design of a major development.”

Also, Part IV.B.4.l states that:

“1. The Stormwater Management rules (N.J.A.C. 7:8) and the Residential Site Improvement Standards for stormwater management (N.J.A.C. 5:21-7), independently and as implemented in this permit, apply to all areas of the Tier A Municipality.”

Under the requirements set forth in N.J.A.C. 7:8-5.8 and N.J.A.C. 5:21-7.9, which refers to N.J.A.C. 7:8-5, all major developments are required to submit maintenance plans for the municipality's review and approval. N.J.A.C. 7:8-5.8(b) further specifies the contents of a maintenance plan, at a minimum, to include:

“...specific preventative maintenance tasks and schedules; cost estimates, including estimated cost of sediment, debris, or trash removal; and the name, address, and telephone number of the person or persons responsible for preventative and corrective maintenance (including replacement).”

In order to assist permittees in ensuring the adequate long-term cleaning, operation, and maintenance of stormwater facilities, Part IV.C.1.a.i and Part IV.C.1.b.i direct permittees to the Department's Maintenance Guidance, which provides examples and templates of detailed maintenance tasks, performance schedules, inspections, and maintenance logs. The New Jersey Stormwater Best Management Practices Manual also contains a chapter entitled “Chapter Eight: Maintenance and Retrofit of Stormwater Management Measures.” Additionally, the Department will publish a technical guidance manual to accompany the MS4 NJPDES permits. All of these technical guidance documents address the maintenance requirements and provide clarity and information to assist with ensuring the proper, long-term operation and maintenance of stormwater facilities.

Under the Stormwater Management rules at N.J.A.C. 7:8-5.8, a private entity is responsible for the stormwater facilities that it owns and operates. Although the Stormwater Management rules do not require the municipality to perform maintenance tasks on stormwater facilities not owned or operated by the municipality, the municipality has the obligation to enforce its ordinance requiring the ongoing maintenance of stormwater facilities. Therefore, Part IV.C.1.b.i of the Tier A MS4 NJPDES permit requires municipalities to:

“maintain a log sufficient to demonstrate compliance with this section; including but not limited to the actions taken by the municipality to enforce compliance with the long-term cleaning, operation and maintenance program . . . “

In sum, the Department maintains that the permit conditions as written are consistent with applicable regulations and provide appropriate information to assist permittees with compliance. The Department maintains that these permit conditions are improved and strengthened as compared to the 2009 MS4 NJPDES permits. The Department does not agree with the suggestion in this comment that the permit should contain clear instructions for maintenance given the site specific nature of maintenance for stormwater facilities.

No changes have been made to the final permit as a result of this comment.

185. **Comment:** Regarding Part IV.C.1.a.i, the term “proper function and operation” needs to be more clearly defined. Commenter 33 suggests the addition of the words “and perform its intended

function including but not limited to providing water quality benefits, lessening the release of pollutants, and preventing flooding." [33]

Response 185: Part IV.C.1.a.i is stated as follows:

"i. Stormwater facility inspection and maintenance must be performed pursuant to any maintenance plans, or more frequently as needed, to ensure the proper function and operation of the stormwater facility. See www.nj.gov/dep/stormwater/maintenance_guidance.htm."

The Department disagrees with this suggested change as it is unnecessary to link proper function and operation to water quality benefits, lessening the release of pollutants, and preventing flooding given that these objectives are inherent in any approved design. Please refer to **Response 184** which describes available guidance and resources for operations and maintenance for stormwater facilities.

No changes have been made to the final permit as a result of this comment.

186. **Comment:** Regarding Part IV.C.1.a.iii, Commenter 11 suggests the addition of the underlined language: "Certify annually that municipally owned and operated stormwater facilities are inspected and properly functioning." [11]

Response 186: Part IV.C.1.a.iii is written as follows:

"iii. The Tier A Municipality shall certify annually that municipally owned or operated stormwater facilities are properly functioning."

The Department disagrees with the change suggested in this comment. Part IV.C.1.a of the Tier A MS4 NJPDES permit requires the municipality to develop, update and implement a program to ensure adequate long-term operation and maintenance of the stormwater facilities owned and operated by the municipality. Part IV.C.1.a.i addresses inspection and maintenance to ensure proper function and operation whereas Part IV.C.1.a.ii addresses maintaining a log of all inspections. In order to certify the proper functioning of stormwater facilities annually, as required at Part IV.C.1.a.iii, the municipality must have performed and logged inspections, regular maintenance and necessary repairs. Part IV.C.1.a.iv addresses a prioritization schedule for repairs. The Department maintains that the language as written leaves the discretion to the Tier A Municipality as to the frequency of inspections but also mandates that proper operation and function be assured. This language assures that the objectives of the program are met but considers the resources of the municipality.

No changes have been made to the final permit as a result of this comment.

187. **Comment:** Commenter 11 states that Part IV.C.1.a.iv does not include specific language and therefore will impose an extremely heavy burden on municipalities. Commenter 11 states that this permit condition will require that an additional budget be set aside for unknown repairs. [11]

188. **Comment:** Commenter 4 states that given the development of the Department's Maintenance Guidance Document in Part IV.C.1.a, the MS4 permit holders will require specific maintenance procedures for each BMP within the Municipality. Commenter 4 states that although this document will provide consistency and uniformity in maintaining this infrastructure, many MS4 permit holders lack the resources to implement these procedures. [4]

Response 187-188: Part IV.C.1.a.iv as referenced in this comment is stated as follows:

“iv. If stormwater facilities were found not to be functioning properly and repairs were not made, then necessary preventive and corrective maintenance shall be documented and prioritized, and a schedule for such repairs shall be maintained. The Tier A Municipality shall prioritize this schedule based upon but not limited to: (1) environmental, health and safety concerns; (2) the findings of catch basin and storm drain inlet inspections performed pursuant to Part IV.B.5.b.ii, above; (3) the findings of stream scouring inspections performed pursuant to Part IV.B.6.b, above; and (4) to incorporate the findings pursuant to Part IV.C.2 (TMDL Information), below.”

As noted above, Part IV.C.1.a.iv specifically addresses maintenance for municipally owned and operated stormwater facilities where stormwater facilities can also be referred to as “BMPs” as indicated in **Comment 188**. Since municipalities generally have different types of stormwater facilities, which have site-specific operation and maintenance characteristics, the Department cannot specifically list methods for maintenance and repair in the permit as suggested in this comment. As the owner and operator of the stormwater facilities, it is the municipalities who have the best knowledge of what repairs will be required and should account for maintenance costs in their budgets to ensure proper operation and function. As described further in **Response 189**, Part IV.C.1.a.iv of Tier A MS4 NJPDES permit does not require municipalities to make the required repairs all at once but instead allows the municipalities the flexibility to prioritize and schedule the needed repairs.

As stated previously, the obligation to repair stormwater facilities owned and operated by the municipality is not a new requirement where maintenance and repair of stormwater facilities was a requirement of both the 2004 and 2009 MS4 NJPDES permits.

No changes have been made to the final permit as a result of these comments.

189. **Comment:** Regarding Part IV C.1.a.iv, Commenter 18 believes that this section should include a deadline and/or timing component so as not to leave the deadline for repairs solely to the permittee. [18]

Response 189: The Department maintains that the language above is appropriate and allows municipalities the ability to prioritize preventative and corrective maintenance as needed. Part IV.C.1.a.iv specifically provides four variables to be considered that may impact maintenance prioritization. In addition, the language as written allows municipalities to create their own written schedule for repairs, so as to not overburden municipalities. As each maintenance action

differs depending on the variables affecting it, the Department maintains that it would be impracticable to create a definitive deadline for municipalities to carry out maintenance activities. The Department understands that there are variables beyond the order in which facilities are inspected that will have an impact on which maintenance activities are to be considered a higher priority than others. Part IV.C.1.a.iv is written in this manner to allow municipalities flexibility and the ability to implement the condition in a practical manner in consideration of a municipality's resources.

In order to provide regulatory oversight of this requirement, municipalities are required to continue to log stormwater facility inspection information and keep prioritization schedules throughout the duration of the permit. These logs and schedules must be made available to the Department if requested. In sum, the Department maintains that Part IV.C.1.a.iv is practical for the purposes of implementation yet is also consistent with the requirements of 40 CFR Part 122.34(a) as it is written in a way that is clear, specific, measurable, and enforceable.

No changes have been made to the final permit as a result of this comment.

190. **Comment:** Commenter 29 expresses concern regarding the requirement for the municipality to develop, update, implement and enforce a program to ensure adequate long-term maintenance of private stormwater facilities constructed prior to the adoption of the permit in 2004. Commenter 29 states that it has approved more than 100 facilities since 1983 and has assured long-term maintenance when projects were approved as subdivisions of site plans. Commenter 29 states that, in order to satisfactorily meet this requirement, a detailed inventory of private stormwater facilities and their maintenance plans will need to be prepared. This will also create a burden on the individual private stormwater facilities to create maintenance plans if they do not have them.

Commenter 29 also states that their current staff levels are not sufficient to properly gather this information and then to inspect and track the efforts to achieve compliance with each of the private facility owners. Commenter 29 states that the Department of Public Works maintains township facilities as required by the stormwater permit but to include private facilities would place a burden on resources. [29]

191. **Comment:** Commenter 13 expresses concern regarding the requirement for the township to develop, update, implement and enforce a program to ensure adequate long-term maintenance of private stormwater facilities not owned or operated by the Township constructed after February 7, 1984. The Township Planning Board and Zoning Board have approved more than a hundred projects incorporating stormwater management features since 1984. There are current ordinances in effect that require on-going maintenance of private facilities in compliance with the approvals and permits they were constructed under and the Township currently maintains archive records of these past projects.

Additional staff would be required to develop, implement, manage, inspect and enforce such a program covering one to two hundred sites in the Township. Commenter 13 suggests that a more prudent proposal would be to require the municipalities to develop an inventory of facilities

within their borders over the duration of this next permit legislation period, with a certain percentage of same being researched and entered into the new inventory each year. [13]

192. **Comment:** Commenter 17 expresses concern regarding the requirement for their Township to develop, update, and maintain an inventory of private stormwater facilities with a program to ensure long-term maintenance. This requirement will apply to those facilities constructed prior to the inception of the permit in 2004. Commenter 17 has approved over one hundred facilities in the past thirty years and has assured long term maintenance through ordinances, homeowner associations and deed restrictions required as projects were approved via the subdivision/site plan process. Commenter 17 does not accept dedication of stormwater facilities due to budget restrictions.

Commenter 17 states that they would be required to increase staff to inventory, document, inspect and keep records on hundreds of facilities. Commenter 17 states that the Department of Public Works maintains township facilities as required by the stormwater permit but to include private facilities would place a burden on resources. [17]

193. **Comment:** Commenter 16 expresses concern regarding Parts IV.B.4.j.ii and IV.C.1.b which requires the permittee to ensure long-term operations and maintenance of stormwater management measures on property not owned or operated by the municipality and not subject to the conditions of another NJPDES stormwater permit. Commenter 16 explains that it is a struggle to maintain the 63 stormwater basins that are owned and maintained by his municipality and estimates that there are at least 50, and possibly up to 100, additional “private” basins located throughout the Township. In reality, Commenter 16 states that there is no way that they can ensure their maintenance.

Commenter 16 questions why this requirement is being applied retroactively to stormwater management facilities constructed over the past 32 years when the permit program itself has only existed since 2004. Commenter 16 questions the legal justification for the 1984 (Clean Water Act) cut-off date in the permit and why this was not part of the original permit.

Commenter 16 questions if the Department will inform the municipality which of these basins are subject to NJPDES permits and if this requirement extends to counties for private facilities that discharge to county drainage systems. Commenter 16 questions if this requirement extends to facilities that do not discharge (directly or indirectly) to the MS4. Commenter 16 states that if these requirements are implemented, there needs to be significant clarification on these issues and the Department needs to be aware that there will likely be numerous instances of non-compliance in this area. [16]

194. **Comment:** Commenters 5, 20 and 23 state that the Department's requirements under the draft permit to ensure the proper operation and maintenance of stormwater facilities that are not owned or operated by the Tier A Municipality constructed after February 7, 1984 will require a significant investigation to locate and log all facilities. These commenters state that many subsurface facilities were built on private property in the 1980s. [5] [20] [23]

Response 190-194: Stormwater runoff from land developments may be conveyed by municipal storm sewer systems or by other drainage systems owned or operated by private entities. Regardless of how the stormwater runoff is conveyed to surface water, unmanaged runoff from land developments has the potential to contribute pollutants and degrade the water quality of the receiving surface water bodies. Instead of an end-of-pipe solution, an effective and comprehensive approach to minimize the potential negative effects of stormwater runoff is to manage the runoff close to the source, namely the land developments.

Land developments are regulated under municipal ordinances, which require stormwater management measures to be implemented and maintained in order to reduce the discharge of pollutants and to reduce the peak flow of stormwater runoff from land developments. Those land developments generating the pollutant loadings were approved by the municipality on the condition that the discharge of stormwater pollutants is reduced prior to the discharge to surface water. Therefore, the municipality must ensure that the private entities maintain the stormwater facilities long-term so that they can continue to function properly. Although municipalities have asserted that they have ensured and enforced the maintenance of privately owned and operated stormwater facilities through municipal ordinances, the municipalities have often failed to continue to ensure the maintenance of stormwater facilities or enforce their municipal ordinances after giving the private entities approval for land developments and the associated stormwater facilities. Municipalities often argue that the municipality's review of proposed maintenance plans and the provision to enforce penalties in the municipality's ordinances are sufficient to ensure the private entities' long-term maintenance of stormwater facilities. Through the municipal audit process and in response to public complaints, it has been proven that these passive methods are not effective in ensuring adequate long-term operation and maintenance of stormwater management facilities. The Department found that stormwater management facilities were often left untended, ponded with water and overgrown with weeds. Some stormwater facilities had failed to function for an extended period of time, but the municipalities were not aware of the situation.

Consistent with the requirements of the 2009 Tier A MS4 NJPDES permit, Tier A Municipalities are required to ensure adequate long-term operation and maintenance of stormwater facilities not owned or operated by the municipality. The maintenance program requirements of this Tier A MS4 NJPDES permit renewal are consistent with but more specific than the 2009 permit requirements. These comments refer to Part IV.B.4.j.ii and Part IV.C.1.b which are stated as follows:

“j. The Tier A Municipality shall ensure adequate long-term cleaning, operation and maintenance of stormwater management measures: ...

- ii. Pursuant to Part IV.C.1.b (Stormwater Facilities Maintenance), not owned or operated by the Tier A Municipality.”

and

“b. The Tier A Municipality shall develop, update, implement and enforce a program to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities not owned or operated by the Tier A Municipality, not subject to the conditions of another NJPDES stormwater permit and constructed after February 7, 1984.”

Periodic inspection of stormwater facilities not owned or operated by the municipality is one way to ensure proper operation and function. However, the Tier A MS4 NJPDES permit does not specifically require the municipality to conduct such inspections or to conduct maintenance on stormwater facilities not owned or operated by the municipality. The municipality is required to have a program in place to ensure that inspections, maintenance, and record keeping is being conducted by the owner or operator of the stormwater facility. Municipalities should adopt stormwater control ordinances to enforce the private stormwater facility owners' and operators' responsibility to conduct long-term operation and maintenance of their stormwater facilities. Stormwater control ordinances could include provisions to enforce citations or fines on private stormwater facility owners if they do not meet their obligations.

The Department maintains that there is legal authority to assure proper operation and maintenance of private systems. 40 CFR 122.26(b)(8) defines a municipal separate storm sewer as the "conveyance system owned or operated" by the public entity. When privately owned or operated stormwater facilities release runoff to the MS4 system, the runoff becomes a portion of the MS4 discharge that is subject to the Tier A MS4 NJPDES permit. Therefore, not only are the stormwater facilities owned or operated by a public entity subject to the scope of MS4 permits, those privately owned and operated stormwater facilities (i.e. development which was approved by the municipality) are also subject to the Tier A MS4 NJPDES permit since the discharge contributes to the MS4. Accordingly, responsible parties (typically, the owner of a stormwater facility) must ensure the proper maintenance of privately owned and operated stormwater facilities that contribute to a portion of the discharge of its MS4 system. Therefore, so long as privately owned and operated stormwater facilities discharge to a municipality's MS4 system, the municipality has the authority and responsibility to ensure (through enforcement of local ordinances) those private sources will not upset the MS4 system.

Moreover, the MS4 NJPDES permit implements the Phase II stormwater rules for NPDES, 40 CFR 122.34(b)(5). 40 CFR 122.34(b)(5)(i)(C) requires the MS4 NJPDES permits to "ensure adequate long-term operation and maintenance of BMPs." The federal rule further provides guidance that the MS4 permittees adopt "operation and maintenance policies and procedures, and enforcement procedures, Post construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with design, construction or operation and maintenance." 40 CFR 122.34(b)(5)(ii). Furthermore, the Phase II final rulemaking document explained that one of the most common methods of addressing the post-construction requirement of ensuring adequate long-term operation and maintenance of BMPs was an agreement between the MS4 operator and another party such as a post-developent landowner. 64 FR at 68761. Therefore, the municipal permittee's obligation to enforce maintenance of privately owned and operated stormwater facilities is a federal mandate to meet the Clean Water Act and the Phase II stormwater rules.

The obligation of the municipality to enforce proper maintenance of privately owned stormwater facilities prior to 2004 and independent of the operation of an MS4 is also inherent from the first adopted Stormwater Management rules in 1983, authorized under the Stormwater Management Act enacted in 1981 (P.L. 1981, c.32, codified as N.J.S.A. 40:55D-93 et seq.). The 1983 Stormwater Management rules require that the “[r]esponsibility for operation and maintenance of storm water management facilities . . . shall remain with the property owner and shall pass to any successor or owner.” However, it also mandates that “the approving agency [of the development] shall be made to insure continued performance of these obligations.” N.J.A.C. 7:8-3.4(a)5 (1983). The 1983 Stormwater Management rules further imposes on the municipality a duty to incorporate a “schedule of maintenance inspections” into the municipality’s ordinance. When a private entity neglects the maintenance duty, the 1983 Stormwater Management rules authorize the municipality to perform the maintenance work for the private entity and charge the private entity for the cost of such work. Although the Stormwater Management rules were revised effective February 2, 2004, the Stormwater Management rules in effect on February 1, 2004 remain applicable to older major development as specified at N.J.A.C. 7:8-1.6(b).

Since the Department’s adoption of the 1983 Stormwater Management rules, many Tier A Municipalities have adopted ordinances to enforce the maintenance duty upon private developments, assess penalties on private entities negligent of maintenance, and perform maintenance work and back charge maintenance costs to negligent private owners. Therefore, this Tier A MS4 NJPDES permit readdresses this enforcement privilege and obligation that has been exercised by many Tier A Municipalities upon privately owned stormwater facilities prior to 2004. Moreover, the provisions of the Stormwater Management rule from 1983 onward and related to ensuring proper operation and maintenance of privately owned or operated stormwater facilities apply to stormwater facilities approved by municipalities regardless of their relationship to a MS4. Proposed Part IV.C.1.b establishes the date frame “constructed after February 7, 1984” to accommodate the time needed for municipalities to adopt stormwater ordinances following the February 7, 1983 adoption of first adopted Stormwater Management rules.

No changes have been made to the final permit as a result of these comments.

195. **Comment:** Commenter 22 states that requiring privately owned and operated stormwater facilities that do not discharge into any stormwater conveyance owned or operated by the Tier A Municipality is unlawful as per Part IV.C.1.b. Commenter 22 states that much of the stormwater from private facilities is discharged into "waters of the State" without first entering any stormwater conveyance owned or operated by the Tier A Municipality.

Commenter 22 states that regulating private stormwater facilities is unlawful not only because the discharges from these facilities do not contribute to any discharge “authorized” by this permit but because these discharges do not contribute to any discharge owned or operated by the Tier A Municipality. As a result, Commenter 22 states that using this permit in this manner conflicts with the Water Pollution Control Act at N.J.S.A. 58:10A-6.a, the pertinent part of which states that “it shall be unlawful for any person to discharge any pollutant, except . . . when the discharge conforms with a valid New Jersey Pollutant Discharge Elimination System permit . . .”

N.J.S.A. 58:10A-6.a establishes that what must conform with the NJPDES permit is the authorized discharge operated by the permittee (i.e., the Tier A Municipality), not other activities independent of this discharge, such as regulation by the Tier A Municipality of private stormwater facilities that do not contribute to a discharge operated by the Tier A Municipality. The New Jersey courts have rejected the concept that municipalities can be NJPDES permittees (or co-permittees) for private wastewater treatment systems not owned or operated by those municipalities. See *New Jersey Builders Ass'n v. Fenske*, 249 N.J. Super. 60, 67-72 (App. Div. 1991). Private stormwater facilities should not be viewed differently in this regard. See also the NJPDES rules at N.J.A.C. 7:14A-4.2(c), which reinforces the principle that a NJPDES permit issued to a Tier A Municipality regulates a facility(ies) operated by the municipality, but cannot require the municipality to regulate the above mentioned private stormwater facilities.

Commenter 22 further states that enforcement actions by the Department against the Tier A Municipality in regard to these private stormwater facilities might well be restricted by language in *State, D.E.P. v. Middlesex Cty. Bd. of Chosen Freeholders*, 206 N.J. Super. 414, 426 (Ch. Div. 1985); *aff'd*, 208 N.J. Super. 342 (App. Div. 1986). This language identified legal obstacles to imposing monetary penalties upon a government agency for failing to carry out properly its regulatory responsibilities as distinct from the agency's responsibility to operate properly the agency's own facilities. For these private stormwater facilities, the regulatory responsibilities of Tier A Municipalities are not part of the responsibilities of Tier A Municipalities to operate properly their own stormwater facilities. See also in this regard *Bubis v. Kassin*, 323 N.J. Super. 601, 617-618 (App. Div. 1999), which identified legal obstacles to compelling municipalities to take enforcement action against those who violate Municipal Land Use Law ordinances.

As described in detail in an appendix to these comments, Commenter 22 disputes all assertions in Section 7.B.2.b of the Fact Sheet which sets forth the alleged legal basis for this permit obligating municipalities to enforce cleaning, operation, and maintenance of stormwater facilities not owned or operated by the municipality and constructed after February 7, 1984, "regardless of location within the municipality" and "regardless of their relationship to a MS4." In this regard, Section 7.B.2.b asserts that this obligation already exists under the 2009 Tier A MS4 NJPDES permit, and is consistent with EPA rules at 40 CFR 122.26(b)(8) and 122.34(b)(5), and with past and present Stormwater Management rules at N.J.A.C. 7:8.

Commenter 22 submits a similar comment for the Tier B MS4 NJPDES permit on Section 7.A.2.d.2 of the Fact Sheet regarding the maintenance program for stormwater facilities not owned or operated by the municipality "constructed after February 7, 1984." Commenter 22 states that it is ludicrous for the Department to assert that Attachment E of the Tier B MS4 NJPDES permit merely "continues" and "clarifies" requirements in the 2009 Tier B MS4 NJPDES permit. [22]

Response 195: Commenter 22 acknowledges that "[m]uch of the stormwater from private facilities is discharged into waters of the State." Stormwater runoff from privately owned and operated stormwater facilities, regardless of whether it discharges directly into the MS4 or surface waters, may contain pollutants that need to be regulated. The Department interprets the rules to mean that any private stormwater facility that discharges to the MS4 and any private facility within the municipality that has a stormwater facility that was subject to N.J.A.C. 7:8 and

municipal review, regardless of where it discharges, are covered under the MS4 permit. As a result, the municipality must ensure that the stormwater facility is being maintained. N.J.A.C. 7:8 does not distinguish between a stormwater facility that discharges to the MS4 versus a stormwater facility that discharges directly to surface waters.

The Department has broad statutory authority to regulate stormwater discharge/runoff and to make certain that municipalities approving stormwater management plans and stormwater control ordinances ensure that those facilities subject to such controls are being operated and maintained as approved. Stormwater Management Act (SMA), N.J.S.A. 40:55D-93 et seq.; Water Pollution Control Act, (WPCA) N.J.S.A. 58:10A-1 et seq. The purpose of the WPCA, N.J.S.A. 58:10A-2, is to “restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water.” The WPCA, N.J.S.A. 58:10A-4, tasks the Department with the responsibility of “control[ing] or abat[ing] water pollution.” The SMA, N.J.S.A. 40:55D-95, requires municipalities to adopt stormwater management plan and ordinances to “prevent . . . an increase in nonpoint pollution” which pollution includes runoff. N.J.S.A. 13:1D-9(n) empowers the Department to “[e]nforce the State air pollution, water pollution, conservation, environmental protection, solid and hazardous waste management laws, rules and regulations.”

N.J.A.C. 7:8-2.2 makes it clear that the goals of the stormwater plan and ordinances, which mirror those of the SMA and WPCA, are to “[p]revent . . . an increase in nonpoint pollution” and to “[m]inimize pollutants in stormwater runoff from new and existing development in order to restore, enhance and maintain the chemical, physical, and biological integrity of the waters of the State, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water.” It is clear from this language that one of the main goals of state stormwater requirements is to protect water quality. Note that N.J.A.C. 7:8 spans multiple areas regulated by the Department, and the various Department subdivisions/bureaus address the relevant requirements of N.J.A.C. 7:8 under their respective programs of oversight. Thus the NJPDES program oversees the elements of municipal stormwater control that affect water quality.

N.J.A.C. 7:14A-25.6(a) states that the stormwater program under the permit “shall . . . include . . . any other control or evaluation measures specified in the NJPDES permit.” This permit includes under Part IV.C.1.b. Other Measures requiring the municipality to “develop, update, implement and enforce a program to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities not owned or operated by the . . . [m]unicipality, not subject to the conditions of another NJPDES stormwater permit.” The Department believes that not including these requirements would leave a regulatory gap for these private facilities which is inconsistent with the purpose of the stormwater-related authorities. Thus the Department has included these requirements to ensure the municipality oversees the stormwater facilities within the municipality which are subject to the municipality’s stormwater requirements.

N.J.A.C. 7:8-5.8 requires that all major developments subject to municipal review must demonstrate compliance with the Stormwater Management rules as part of the municipal site

plan review. This means that all maintenance requirements that were approved as part of a major development site plan must be implemented and the municipality must ensure that the maintenance activities are being implemented. N.J.A.C. 7:8 does not distinguish between discharges directly to surface water and discharges to a MS4 system. N.J.A.C. 7:8 requires the development and implementation of maintenance plans for all stormwater management measures incorporated into all major developments. In addition, N.J.A.C. 7:8-4.2(c)5 requires a Municipal Stormwater Management Plan to:

“Describe how adequate long-term operation as well as preventative and corrective maintenance (including replacement) of the selected stormwater management measures will be ensured.”

The requirements for Municipal Stormwater Management Plans, which have been adopted by all Tier A and Tier B Municipalities, do not specify that the requirement to ensure maintenance only applies to stormwater discharges to the municipally owned or operated system. It applies to all stormwater facilities approved by the municipality. N.J.A.C. 7:8 also requires municipalities to adopt a Stormwater Control Ordinance to implement the adopted Municipal Stormwater Management Plan, including the maintenance requirements. In addition, the requirement to ensure maintenance of stormwater facilities not owned or operated by the municipality is not a new requirement. Part I.F.c.iii of the 2009 Tier A MS4 NJPDES permit instructs municipalities to ensure adequate long-term operation and maintenance of stormwater facilities on property not owned or operated by the municipality and does not distinguish between those discharging directly to the system and those discharging to waters of the state. Municipalities across the state should already have a system in place to ensure the maintenance of privately owned and operated stormwater facilities.

Finally, the cited statutes and regulations do not preclude the Department from including the Part IV.C.1.b requirements in this permit, and the legal cases cited in this comment have facts and circumstances that are either inapplicable to the MS4 permits or do not support or advance the commenter’s arguments. The Department’s response on each of the cases referenced in this comment are as follows:

- The situation in *New Jersey Builders Ass'n v. Fenske*, 249 N.J. Super. 60, 67-72 (App. Div. 1991) was that the private treatment plants are permitted and regulated by the Department, but the Department required a municipality, as a co-permittee, to be responsible for the operation of private treatment works as a condition of issuing the permit. The court struck down the Department’s co-permittee requirement because the legislation does not authorize the “shift of fiscal and prime regulatory responsibility” from the Department to the municipalities. *Id.* at 69. The circumstances in the Tier A and Tier B MS4 NJPDES permits are distinguishable from *Fenske*. The privately owned and operated stormwater facilities are all regulated by the municipalities under the requirements of Stormwater Management Act, N.J.S.A. 40:55D-93 to -99, enacted in 1981.. Therefore, municipalities have the statutory responsibility to regulate those privately owned and operated stormwater facilities.

- The commenter cites *State, D.E.P. v. Middlesex Cty. Bd. of Chosen Freeholders*, 206 N.J. Super. 414, 426 (Ch. Div. 1985); *aff'd*, 208 N.J. Super. 342 (App. Div. 1986) to support the comment that there is a legal obstacle for the Tier A MS4 NJPDES permit to enforce the municipalities' obligation to ensure proper maintenance of privately owned and operated stormwater facilities. The rationale and facts addressed in the case are inapplicable to the circumstances in the Tier A and Tier B MS4 NJPDES permits. In *Middlesex Cty. Bd. of Chosen Freeholders*, the legal question was whether the Department can sue counties for monetary penalties and injunctive relief for the counties adoption of deficient solid waste plans when the Solid Waste Management Act grants the Department to exercise the planning power if counties fail to do so. The court denied the Department's request to order the counties to perform the planning duties because under the Solid Waste Management Act the Department's exclusive remedy is to exercise its authority to do the planning work for the counties. Unlike the Solid Waste Management Act, the Stormwater Management Act does not authorize the Department to directly enforce municipal stormwater requirements if the municipality fails to do so. The Stormwater Management Act, N.J.A.C. imposes the obligation to enforce the municipal ordinance on municipalities. Therefore, the facts and circumstances in *Middlesex Cty. Bd. of Chosen Freeholders* are inapplicable to the Tier A and Tier B MS4 NJPDES permits.
- The commenter cites *Bubis v. Kassin*, 323 N.J. Super. 601, 617-618 (App. Div. 1999) to support the argument that the Department has a legal obstacle to compel municipalities to enforce maintenance duties on the private parties. In *Bubis*, the plaintiff sought the court's order to compel the township to enforce its zoning ordinances against the defendants. However, the court found that plaintiff's claim of defendant's violation of a municipal ordinances was tenuous; therefore, the court had no basis to order the municipality to enforce its ordinance. *Id.* at 617. Unlike the situation in *Bubis*, when a private party fails to properly operate and maintain its stormwater facilities, the private party clearly violates the municipal stormwater requirements. Therefore, the Department would have a legal basis for requesting the municipality to enforce its ordinance of maintenance requirements.

No changes have been made to the final permits as a result of this comment.

196. **Comment:** Commenter 10 states that the draft Tier B MS4 NJPDES permit proposes to apply the post-construction stormwater management requirements to private and publicly owned stormwater management systems approved by the municipalities after February 7, 1984 which is more than two decades prior to the effective date of permit authorization. This new requirement is not consistent with the Stormwater Management Rules (N.J.A.C. 7:8), as claimed by the Department, or the Municipal Stormwater Regulation Program (N.J.A.C. 7:14A-25). Rather, the maintenance requirements contained in N.J.A.C. 7:8-5.8 and N.J.A.C. 7:14A-25.6(b)3 are clearly intended to apply only to new development or redevelopment. Commenter 10 states that in addition to this portion of the Tier B MS4 NJPDES permit being inconsistent with the original stormwater discharge permit and subsequent renewals, this requirement represents a vast expansion of Department mandated post-construction stormwater management requirements and

is not supported by relevant laws or statutes. Commenter 10 states that at no point do these laws or statutes suggest that maintenance requirements are applicable to “all” stormwater facilities regardless of their age.

Commenter 10 states that the draft Tier B MS4 NJPDES permit Fact Sheet claims that the regulation of pre-2004 stormwater management systems is authorized by selectively cited language from the 1983 stormwater management rules. This approach fails to acknowledge that a vast number of the developments approved between 1983 and 2004 were not regulated by or subject to the 1983 stormwater rules. Commenter 10 asks that the Department explain how stormwater facility maintenance requirements gleaned from the 1983 stormwater rules are now being applied to developments that were never subject to these rules.

Commenter 10 states that the draft Tier B MS4 NJPDES permit requires Tier B municipalities to ensure adequate, long-term cleaning, operation and maintenance of stormwater facilities that are owned by the municipality. Accordingly, it is clear that this maintenance requirement is only intended to apply to those stormwater facilities that were approved since the EDPA and subject to compliance with N.J.A.C. 7:8 (Stormwater Management). Commenter 10 states that prior Tier B permit guidance provided by the Department was consistent with this approach and never referred to the application of such maintenance standards to stormwater facilities approved prior to the EDPA.

Commenter 10 also states that the Department assumes that municipalities have records going back 33 years which identify when each and every development (public or private) was approved by the municipality; however, in many instances, this information is simply not available. Commenter 10 states that the Tier B MS4 permit renewal should provide specific guidance as to what municipalities should do when they cannot ascertain the date of municipal approval for such developments. [10]

Response 196: While Commenter 10 has specified that his comments pertain to the Tier B MS4 NJPDES permit (NJ0141861) only, the Department notes that Part IV.B.4 in the Tier A MS4 NJPDES permit contains the same requirements as Part IV.B.2 in the Tier B MS4 NJPDES permit regarding Minimum Standards for Post Construction Stormwater Management in New Development and Redevelopment. Additionally, Tier B Municipalities are required to ensure adequate long-term operation and maintenance of stormwater facilities owned or operated by the municipality. The obligation of the municipality to enforce proper maintenance of privately owned stormwater facilities prior to 2004 is discussed at length in **Response 190-194.**

Stormwater facility maintenance requirements in the Tier B MS4 NJPDES permit have been clarified in a new Attachment E – Stormwater Facilities Maintenance, which is similar to Part IV.C.1 of the Tier A MS4 NJPDES permit, where Attachment E is referenced in Part IV.B.2.j. Attachment E makes it clear that municipalities must maintain stormwater facilities that they own or operate, and also continue to ensure maintenance of stormwater facilities that they do not own or operate and which are not subject to another NJPDES stormwater permit. In order to prove that the maintenance of stormwater facilities has been performed by the private entities and ensured by the municipalities, Attachment E requires the municipality to maintain a log

demonstrating the actions that they have taken to ensure private entities are maintaining their stormwater facilities. Attachment E also clarifies the requirements for recordkeeping related to stormwater facilities maintenance.

Attachment E of the Tier B MS4 NJPDES permit does not require the municipalities to inspect and maintain privately owned and operated stormwater facilities itself. Instead, the municipality must have a program to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities not owned or operated by the municipality. For example, the municipality can require private entities to submit their maintenance logs to the municipality or request private entities to certify that they have maintained their stormwater facilities in accordance with the associated maintenance plans. The municipality can then audit private entities on a random basis to ensure compliance with the requirement. Also, the municipality should actively require private stormwater facility owners or operators to routinely take preventive action to maintain the proper function of the stormwater facilities and take corrective actions on failing stormwater facilities.

Commenter 10 makes reference to the “Tier B Municipal Guidance Document” (see http://www.state.nj.us/dep/dwq/tier_b_guidance.htm) as part of the implementation schedule. This guidance document should not be misconstrued to mean that the maintenance requirement is limited to only those BMPs constructed after 24 months of the effective date of the permit authorization, nor to only those BMPs approved after the adoption of the municipal Stormwater Control Ordinance. As addressed above, the stormwater program is a comprehensive program intended to protect water quality. Those stormwater facilities constructed before the 2004 Tier B MS4 NJPDES permit are clearly a part of the BMPs implemented to reduce pollutant loadings; therefore, it is essential and mandatory to ensure the long-term, proper operation and maintenance of those stormwater facilities.

As described in the previous response, the Department maintains that there is clear legal authority to require maintenance of stormwater management systems in for stormwater facilities that are owned by the municipality. While every effort should be made to ensure that privately owned stormwater facilities have maintenance plans, in the absence of such a plan, the permittee should ensure compliance with the condition of Attachment E to ensure the proper operation and function of the stormwater facility. In addition, the New Jersey Hydrologic Modeling Database (or H&H Database) is posted on line and encompasses several decades of data collection by NJ Soil Conservation Districts and the New Jersey Department of Agriculture. This database contains a wealth of information regarding stormwater management basins and data can be downloaded based on location. See <https://hydro.rutgers.edu> to view the database map or https://hydro.rutgers.edu/public_data/ to download data in an Excel format. The information in this database may help municipalities to identify stormwater basins that they were not aware of. This will help to identify basins that may require maintenance, and can help the municipality to develop a more robust inventory as a result.

Please refer to **Response 184** for information as to available resources that can be used to inform ongoing maintenance.

No changes have been made to the final permit as a result of this comment.

197. **Comment:** Commenter 22 states that the Department must identify in the final permit decision the criterion that must be met for a stormwater facility to be “subject to the conditions of another NJPDES stormwater permit” as described in Part IV.C.1.b. Commenter 22 questions if it suffices to say that the stormwater discharge through or from this facility is regulated by this other NJPDES permit; or does this other NJPDES permit have to include a condition(s) specific to this facility.

As an example, Commenter 22 states that some industrial plants whose stormwater discharges are regulated by the NJPDES “Basic Industrial Stormwater” General Permit No. NJ0088315 (Category Code 5G2) may have stormwater management basins that handle those discharges, but that are not needed to comply with that general permit. Instead, those basins were installed for some other reason such as to comply with a municipal or county ordinance or a Land Use permit as issued by the Department. Commenter 22 questions if those stormwater management basins are “subject to the conditions of another NJPDES stormwater permit.” Commenter 22 states that the Tier A MS4 NJPDES permit and Section 7.B.2.b of the Fact Sheet fail to identify the criterion that must be met for a stormwater facility to be “subject to the conditions of another NJPDES stormwater permit.”

Commenter 22 submits a similar comment on the Tier B MS4 NJPDES permit regarding Part IV.B.2.j and Attachment E which pertains to maintenance for stormwater facilities not owned or operated by the municipality. And the Section 7.A.2.d.2 of the Tier B Fact Sheet fails to identify the criterion that must be met for a stormwater facility to be “subject to the conditions of another NJPDES stormwater permit.” [22]

Response 197: The Department disagrees with this comment. The permit language in Part IV.C.1.b clearly and unambiguously directs to “stormwater facilities not owned or operated by the Tier A Municipality, not subject to the conditions of another NJPDES stormwater permit and constructed after February 7, 1984.”

For example, when an industrial facility is regulated under another NJPDES general or individual permit, the industrial facility is required by that permit to specify and list the Best Management Practices (i.e. which may include stormwater facilities) that are incorporated specifically to eliminate the exposure of source materials or industrial activity to stormwater discharges. The industrial facility may also be required to prepare an operation and maintenance manual and conduct monthly or annual inspections for those specified Best Management Practices. Therefore, Part IV.C.1.b would not apply to that facility’s stormwater facilities. Alternatively, if the industrial facility has stormwater facilities that are not incorporated as part of the facility’s SPPP to satisfy the conditions of the NJPDES general or individual permit, but are for compliance with municipal ordinances to implement the requirements of a Tier A MS4 NJPDES permit, then those stormwater facilities at the industrial facility will be subject to the requirements set forth in Part IV.C.1.b.

In sum, Part IV.C.1.b is clear to mean only a facility's specific "stormwater facilities." Any stormwater facilities that are subject to conditions of another NJPDES permit can be excluded from the requirements in Part IV.C.1.b, not the facility per se entirely.

No changes have been made to the final permits as a result of these comments.

198. **Comment:** Commenter 22 states that nothing in Part IV.C.1.b restricts its scope to stormwater facilities that discharge into the MS4 or MMY owned or operated by the Tier A Municipality. Instead, as discussed below, the Tier A MS4 NJPDES permit Fact Sheet expressly rejects this restriction at Section 7.B.2.b. Commenter 22 provides additional discussion of aspects of Section 7.B.2.b in an Appendix to his comments. [22]

Response 198: The relevant portion of excerpts of the Fact Sheet as referenced in this comment is as follows:

"As required by the 2009 Tier A MS4 NJPDES permit, Tier A Municipalities are required to ensure adequate long-term operation and maintenance of stormwater facilities **not owned or operated by the municipality**. This draft Tier A MS4 NJPDES permit renewal continues to require the Tier A Municipality to develop, update, implement and enforce a program to ensure adequate long-term cleaning, operation and maintenance of all stormwater facilities not owned or operated by the Tier A Municipality and not subject to the conditions of another NJPDES stormwater permit. The maintenance program requirements of this draft Tier B MS4 NJPDES permit are consistent with but more specific than the 2009 permit requirements, and consist of the following components ...

This requirement is sometimes assumed to be applicable only to privately owned or operated facilities approved under the Tier A Municipality's Post Construction Stormwater Management program (typically after March 1, 2004) and only to stormwater facilities that are connected to the Tier A Municipality's MS4. This draft Tier A MS4 NJPDES permit clarifies that the municipality's obligation to enforce cleaning, operation, and maintenance also encompasses the stormwater facilities approved by the municipality prior to 2004, regardless of location within the municipality, which is consistent with state and federal regulations...

The obligation of the municipality to enforce proper maintenance of privately owned stormwater facilities prior to 2004 and independent of the operation of an MS4 is also inherent from the first adopted Stormwater Management rules in 1983, authorized under the Stormwater Management Act enacted in 1981 (P.L. 1981, c.32, codified as N.J.S.A. 40:55D-93 et seq.)...

Since the Department's adoption of the 1983 Stormwater Management rules, many Tier A Municipalities have adopted ordinances to enforce the maintenance duty upon private developments, assess penalties on private entities negligent of maintenance, and perform maintenance work and back charge maintenance costs to negligent private owners. Therefore, this draft Tier A MS4 NJPDES permit readdresses this enforcement privilege and

obligation that has been exercised by many Tier A Municipalities upon privately owned stormwater facilities prior to 2004. Moreover, the provisions of the Stormwater Management rule from 1983 onward and related to ensuring proper operation and maintenance of privately owned or operated stormwater facilities apply to stormwater facilities approved by municipalities regardless of their relationship to a MS4. Proposed Part IV.C.1.b establishes the date frame “constructed after February 7, 1984” to accommodate the time needed for municipalities to adopt stormwater ordinances following the February 7, 1983 adoption of first adopted Stormwater Management rules...”

The Department intends to continue to regulate privately owned stormwater facilities under this Tier A MS4 NJPDES permit regardless of whether or not those facilities discharge to an MS4 as described in **Response 190-194**. Additionally, the Department intended to regulate MMY regardless of whether that MMY discharges to an MS4. Please refer to **Response 42** and **Response 50**.

No changes have been made to the final permits as a result of this comment.

199. **Comment:** Commenter 15 states that the Department should require all stormwater facilities to be inspected, as opposed to just municipally owned or operated facilities, and that stormwater facilities be inspected at a specific minimum frequency. Such a requirement is important because when MS4 permittees do not inspect stormwater facilities they cannot enforce any violations and are generally unaware of the functionality of the practices within their jurisdictions. (NJDEP, Preliminary Stormwater Audit of South Toms River Borough, Ocean County, NJPDES Permit Number NJG0150622, PI Number 202083, at 12-13 (Mar. 2, 2015)). Commenter 15 states that EPA specifically recommended an inspection requirement in its 2014 review of the current permit:

“EPA recommends inspection of all privately-owned post-construction practices and tracking of conditions. . . . Structural post-construction BMPs must be inspected and maintained to remain effective. Tracking the locations, conditions, ages of BMPs as well as the inspection findings is critical to ensuring the proper maintenance occurs for the life of the BMP. Comprehensive ‘as built’ inspections are necessary at the conclusion of a project to ensure the BMP has been built properly and regular inspections are critical to ensure the BMP is being maintained as needed. NJDEP may choose to require permittees to also inspect private BMPs themselves or allow that the owners/operators of the facility be required to inspect them as specified in maintenance agreements or other mechanisms. If the permit allows self-inspections, the permit should require that the program require facility owner/operators submit documentation detailing inspection dates and maintenance performed.” (EPA Permit Review at 13-14).”

Commenter 15 states that EPA further reiterated the need for regular inspections in its comments on an earlier preliminary draft of this permit renewal:

“EPA believes ‘maintenance plans’ should require that all facilities are inspected once per year, for both the water quality of their effluent (based-on amount of siltation, or monitoring,

or both), as well as their hydraulic performance (based-on ponding, drain-down, etc.). ... All facilities should be inspected at the owner's expense by licensed and experienced third-party engineers, and resulting reports should be submitted to the municipality for compliance review." (U.S. EPA Region 2, Comments on NJDEP Preliminary Draft Tier A MS4 Permit, at 5 (Apr. 15, 2016))."

Commenter 15 continues by stating that inspections of stormwater facilities are required in several other states' permits which proves that inspections are practicable and must be included in the Tier A MS4 NJPDES permit in order to satisfy the MEP standard. Moreover, other states' permits provide instruction as to how the Department can address the issue of its ability, or the ability of its representatives, to legally enter private property to conduct those inspections. Commenter 15 states that examples of provisions can be found that address this issue as an Appendix to the comments. [15]

Response 199: As noted previously, Part IV.C.1.b.i of the Tier A NJPDES Permit requires municipalities to ensure that private entities perform maintenance pursuant to any maintenance plans, or more frequently as needed to ensure the proper function and operation of the stormwater facility. Part IV.C.1.b.ii of the Tier A MS4 NJPDES permit further requires municipalities to maintain a log sufficient to demonstrate compliance with this section; including but not limited to the actions taken by the municipality to enforce compliance with the long-term cleaning, operation and maintenance program.

Although Part IV.C.1.b of the Tier A MS4 NJPDES permit does not require municipalities to inspect and maintain privately owned and operated stormwater facilities itself, under Part IV.C.1.b of the draft Tier A MS4 NJPDES permit, municipalities must have a program to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities not owned or operated by the municipality. For example, the municipality can require private entities to submit their maintenance logs to the municipality or request private entities to certify that they have maintained their stormwater facilities in accordance with the associated maintenance plans. The municipality can then audit private entities on a random basis to ensure compliance with the requirement. Additionally, the municipality should actively require private stormwater facility owners or operators to routinely take preventive action to maintain the proper function of the stormwater facilities and take corrective actions on failing stormwater facilities. At this time, most municipalities have ordinances in place to allow access to stormwater facilities in the event of a problem occurring with the facility. Therefore, Part IV.C.1.b of the Tier A MS4 NJPDES permit has clear, specific, and measurable terms for maintenance requirements.

The Department does not agree that the Department should mandate inspections of private stormwater facilities simply because other states do so. As stated in the MS4 General Permit, it is not "necessary to expressly require the rule to compel permitting authorities to consider the terms and conditions of permits in other jurisdictions in determining the need to modify their own permits." The federal rules do not require all states to have a uniform approach and standards in their MS4 permits. Thus, the Department is not required to adopt other states' conditions and terms in the Tier A MS4 NJPDES permits. In addition, and as described in **Response 200**, the Department maintains that legal access to private facilities is not an issue.

No changes have been made to the final permits as a result of this comment.

200. **Comment:** Commenter 4 states that the proposed revisions at Part IV.C.1.b will expand the oversight and documentation to include the location of all municipally-owned BMP's as well as all privately owned BMP's that are not covered in an individual MS4 permit. The Department does not provide for the authority of the municipal staff to access BMP's contained on private lands. [4]

Response 200: The Department disagrees that the municipality does not have the authority to access stormwater facilities located on private property. As noted in **Response 190-194**, and consistent with the 2009 Tier A MS4 NJPDES permit, this permit renewal requires municipalities to develop, update, implement, and enforce a program to ensure adequate long-term cleaning, operation, and maintenance of stormwater facilities approved but not owned or operated by the Tier A Municipality as per Part IV.C.1.b. The program developed by the municipality is effected by the implementation of local ordinances required by the MS4 NJPDES permit and supported by the legal authority derived from applicable state and federal laws and regulations, such as the Federal Clean Water Act, New Jersey Water Pollution Control Act, New Jersey Stormwater Management Act, New Jersey Pollutant Discharge Elimination System Rules, and New Jersey Stormwater Management Rules. In particular, N.J.A.C. 7:14A-2.11(d)3:

“...grants the Department access, at reasonable times, to any vessel, facility, property, or location to inspect and copy all relevant documents or, at the Department's request, copy and furnish to the Department all such documents.”

Since the municipality is performing the duty assigned by the Department under N.J.A.C. 7:14A, the municipality would be justified in having similar authority under those provisions.

The municipality could also adopt an ordinance allowing access to stormwater facilities approved by the municipality under the stormwater management rules or the municipality could stipulate that access to the stormwater facility is a condition of the individual site approval. In fact, many municipalities have already adopted ordinances granting access to privately owned or operated stormwater facilities.

In an effort to assist municipalities in meeting their obligations to ensure adequate long-term operation and maintenance of stormwater facilities not owned or operated by the municipality, the Department developed and issued a letter issued to all municipalities on May 15, 2017 outlining those obligations. The letter can be distributed to private stormwater facility owners and operators as part of the municipality's outreach and implementation effort and can be used to encourage collaboration with private facility owners. This letter can be used to help gain access, when required, to private property on which a stormwater facility is located. This letter is included as Attachment 1 to this Response to Comments document.

No changes have been made to the final permit as a result of this comment.

201. **Comment:** To further improve Stormwater Facility Maintenance permit requirements, Commenter 15 suggests that Part IV.C.1.a and b be modified to include additional conditions. Specifically, if an inspection reveals that a practice is not functioning, the permittee should be required to repair the practice if it is municipally owned, or inform the owner of a privately owned practice that repairs are required. Commenter 15 continues by stating that if the owner does not comply, the MS4 permittee must perform the repairs itself. Commenter 15 continues by stating that the draft permit does require municipalities to “document and prioritize” a maintenance schedule for necessary repairs, but it should be more explicit in requiring the repairs to be carried out within a reasonable timeframe. [15]

Response 201: Regarding the suggestion that the NJPDES MS4 permit require Tier A Municipalities to repair the practice if it is municipally owned, please refer to **Response 184** for additional information.

Regarding the suggestion that the NJPDES MS4 permit require Tier A Municipalities to assume repairs for privately owned stormwater facilities, the Department does not agree that this is appropriate. Rather, the Tier A Municipality is required to have a program in effect to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities not owned or operated by the Tier A Municipality.

No changes have been made to the final permit as a result of this comment.

202. **Comment:** Commenter 15 urges the Department to require municipalities to provide information to owners of stormwater facilities about the importance of proper maintenance. Currently, the draft permit includes this as an optional requirement in the Public Education and Outreach section, but it should be made mandatory for all MS4s because it is so critical to ensuring that facilities function properly. [15]

Response 202: The Department disagrees that the Tier A MS4 NJPDES permit should specifically require the distribution of information regarding the importance of proper stormwater facility maintenance. As noted previously, Part IV.C.1.b requires that the Tier A Municipality “develop, update, implement and enforce a program to ensure adequate long-term cleaning, operation and maintenance of stormwater facilities not owned or operated by the Tier A Municipality...” If the municipality chooses to incorporate the distribution of information regarding the proper maintenance of stormwater facilities, they may do so as part of their program to ensure maintenance.

In addition, Part IV.B.4.d requires that the Tier A Municipality “shall review and analyze development applications for compliance with Part IV.B.4 (Post Construction) of this permit even if a separate permit is required by the Department for the same or similar activity (e.g. a Land Use permit).” The municipality is required to review the development application in accordance with N.J.A.C. 7:8. N.J.A.C. 7:8-5.8 requires the design engineer to prepare a maintenance plan for the stormwater management measures incorporated into the design of a major development. During the review of the major development application the municipality must review the maintenance plan and approve its contents. At the time of review the

municipality can confirm that the maintenance plan is thorough and stress the importance of proper maintenance.

No changes have been made to the final permit as a result of this comment.

203. **Comment:** Regarding Part IV.C.1.b, Commenter 18 recommends further specificity be added to define what the state means by “adequate long-term cleaning, operation, and maintenance.” If this information is included in state guidance or elsewhere, it is suggested that the permit provide this explanation. [18]
204. **Comment:** Regarding Part IV.C.1.b.i, the term “proper function and operation” needs to be more clearly defined. Commenter 33 suggests the addition of the words “and perform its intended function including but not limited to providing water quality benefits, lessening the release of pollutants, and preventing flooding.” Commenter 33 strongly supports Part IV.C.1.b as well as Part IV.C.1.b.i. Commenter 33 suggests the inclusion of inventory and mapping requirements applauds the development of a mobile friendly app. [33]

Response 203-204: Please refer to **Response 185** regarding maintenance issues and **Response 176-178** regarding inventory.

205. **Comment:** Commenter 33 suggests that the words “and public” be added to Part IV.C.1.c so that maintenance plans are available to the public in a central location. [33]

Response 205: Part IV.C.1.c is stated as follows:

“c. The Tier A Municipality shall maintain copies of all maintenance plans, as defined in Notes and Definitions Part IV.B.1.g of this permit, for stormwater facilities approved by the municipality. The Tier A municipality shall make copies of these maintenance plans available to the Department upon request.”

The Department maintains that this suggested change is unnecessary. OPRA procedures are already in place and allow the ability for the public to access municipal documents on an as needed basis. A stormwater facility Maintenance Plan is a required component of a major development application and would therefore be part of the public record.

No changes have been made to the final permit as a result of this comment.

Part IV.C, Other Control Measures

2. Minimum Standards for Total Maximum Daily Load Information (Tier A MS4 NJPDES Permit only)

206. **Comment:** Commenters 5, 20 and 23 state that the requirement related to the review of TMDL reports will impact the municipality. Unlike the 2004 permit, the Department is not providing any funds to the Tier A municipalities to help address these new requirements. [5] [20] [23]

Response 206: Section 303(d) of the federal Clean Water Act requires development of a TMDL for the pollutant(s) responsible for each waterbody placed on the impairment list where impaired waterways are ranked and prioritized for TMDL development. A TMDL may be viewed as a pollutant budget for an impaired waterbody meaning it is the maximum amount of a pollutant that a waterbody can receive and still meet the NJSWQS. The TMDL is allocated among all of the sources of the pollutant, including point sources, nonpoint sources, and natural contributions. TMDLs include implementation plans which identify a suite of measures that may assist in reducing loads from each source.

The Department incorporated new requirements to address TMDLs in the Tier A MS4 NJPDES permit at Part IV.C.2. Part IV.C.2.a reads as follows:

“a. Incorporation of TMDL Information Into the SPPP

- i. The Tier A Municipality shall annually review approved or adopted TMDL reports to identify stormwater related pollutants listed therein and associated with any segment of surface water wholly or partially within or bordering the Tier A Municipality. This information may be accessed at www.nj.gov/dep/dwq/msrp-tmdl-rh.htm;
- ii. The Tier A Municipality shall use TMDL information identified in i, above to, at a minimum, (1) assist in the prioritization of stormwater facility maintenance including schedules for repairs required at Part IV.B.6.b.iv (Stream Scouring) and IV.C.1.a.iv (Stormwater Facilities Maintenance), above; and (2) identify and develop strategies to address specific sources of stormwater related pollutants contributing to discharges authorized under this Tier A MS4 NJPDES permit. Strategies may include but are not be limited those found in the implementation section of approved or adopted TMDL reports (for examples see “Total Maximum Daily Load (TMDL) Guidance for Tier A MS4 Permittees” found at www.nj.gov/dep/dwq/msrp-tmdl-rh.htm); and
- iii. The Tier A Municipality shall annually update its SPPP to list information identified in i and ii, above; and
- iv. The Tier A Municipality shall incorporate any strategies identified in ii(2), above as an Optional Measure. See Part IV.E (Optional Measures) and Part IV.F.1.c (SPPP), below.”

The requirements at Part IV.C.2 were developed in consideration of information garnered from numerous outreach sessions. Specifically, the Department was made aware of a general lack of awareness among municipal representatives regarding TMDLs in waterbodies within a Tier A Municipality despite their connection to the MS4 system. This is partially due to the fact that TMDLs are apportioned to a specific watershed which does not typically match Tier A Municipality borders. In fact, multiple TMDLs can apply within one municipality. Part IV.C.2 is intended to remedy this gap in awareness and encompasses an iterative step forward. This awareness, coupled with other improvements as required by the Tier A MS4 NJPDES permit, is

expected to improve implementation of stormwater BMPs and make reasonable progress toward achieving the pollutant reductions specified in approved or adopted TMDLs.

To ensure that this permit requirement is user friendly and to account for limited municipal resources, the Department developed the TMDL Look-Up Tool (www.state.nj.us/dep/dwq/msrp-tmdl-rh.htm) as indicated in Part IV.C.2.a.ii. This free on-line tool streamlines and simplifies access to TMDL information and was developed specifically to assist New Jersey's municipal Stormwater Coordinators with the identification of applicable TMDLs. The TMDL Look-Up Tool uses a dropdown feature to locate the municipality and county. The tool then displays a list of watersheds along with a link to any established, approved, or adopted TMDLs for particular pollutants associated with any segment of surface water wholly or partially within or bordering the Tier A Municipality. Identification of this information for inclusion in the SPPP is not anticipated to be burdensome or time consuming.

Short-term and long-term management strategies are typically included within TMDLs along with segment specific recommendations. As part of the development of Part IV.C.2 and in consideration of limited municipal resources, the Department reviewed approved TMDLs and gathered suggested strategies for pollutants commonly addressed by TMDLs. This information is described in the document entitled "Total Maximum Daily Load (TMDL) Guidance for Tier A Permittees" as available at www.state.nj.us/dep/dwq/msrp-tmdl-rh.htm. The guidance identifies the usual sources of particular pollutants and possible actions a municipality can take to reduce discharge of such pollutants from the MS4. Tier A Municipalities can review these strategies and use this information to assess any local water quality issues in relation to operation and maintenance of the MS4. For example, a common cause of waterbody impairment is pathogen parameters. The current "Total Maximum Daily Load (TMDL) Guidance for Tier A Permittees" contains the following suggested strategies:

<i>Fecal Coliform/Total Coliform/ E. Coli/Enterococcus/Pathogens</i>	
Potential Sources	Potential Responses
Stormwater management facilities that are improperly designed and/or maintained	Ensure proper operation and maintenance of publicly owned and privately owned stormwater management facilities
	Retrofit existing stormwater management facilities to provide enhanced water quality benefits
Illicit discharges and connections	Identify and eliminate illicit discharges and connections
	Prioritize infrastructure mapping and inspection in TMDL areas
Malfunctioning sewage conveyance facilities	Identify and eliminate illicit discharges and connections
On-site disposal systems that are	Identify and eliminate illicit discharges and

inadequately designed, operated, maintained, or located	connections
Runoff from impervious surfaces such as sidewalks, roads, rooftops	Encourage green or blue infrastructure and adopt BMPs as necessary especially for any new construction (see www.nj.gov/dep/gi/)
Pets	Enforce pet waste ordinance(s)
	Target public education materials to pet owners
Wildlife	Enforce wildlife feeding ordinance(s)
	Establish goose management BMPs
	Riparian/Lake and “No Mow” buffer restoration

The Department maintains that Part IV.C.2 effectively draws a nexus between TMDLs and strategies that can be implemented by the Tier A Municipality.

No changes have been made to the final permit as a result of this comment.

207. **Comment:** Commenter 15 states that regarding wasteload allocations and TMDLs, EPA stated that the Department:

“..must assess [the] adequacy of existing BMPs to achieve the stormwater WLAs,”

and that:

“[i]f the assessment of BMPs indicates that the BMPs used to fulfill the SBRs are not sufficient to achieve the stormwater WLA, NJDEP will either have to prescribe additional BMPs or require the MS4 to identify additional BMPs to achieve further pollutant reductions.” (EPA Permit Review at 7-8).

EPA then concluded that the Department is required to consider requirements for MS4s with stormwater discharges to impaired waterbodies prior to TMDL approval.

Commenter 15 states that, contrary to EPA’s instructions, the Department has not included any Additional Measures from TMDLs in the permit; nor any other BMPs designed to achieve wasteload allocations; nor provided any analysis indicating that the requirements of the permit are adequate to achieve wasteload allocations. Permit requirements at Part IV.C.2 to “identify” and “review” TMDLs are not requirements to implement any sort of practices or undertake actions that could reduce pollution. Commenter 15 states that the requirement to use TMDLs to prioritize maintenance simply directs permittees to consider an additional source of information when implementing a pre-existing permit requirement. And the mandate to “identify and develop strategies” that are integrated into stormwater plans as optional measures does not require MS4s to implement the opportunities they have identified as any actions following from this “identification of strategies” are purely voluntary as Optional Measures. These provisions satisfy neither EPA’s requirements nor the underlying legal obligations with which the agency has directed the Department to comply. Commenter 15 that it is not “consistent with the

assumptions and requirements of any available wasteload allocation” (40 CFR 122.44(d)(1)(vii)(B)) to include no mandatory requirements for reducing the discharge of pollutants that have been assigned wasteload allocations, when the central premise of a wasteload allocation is that pollution reductions are necessary in order to meet water quality standards. [15]

208. **Comment:** Commenter 6 states that the permit could go farther regarding compliance of water quality standards in TMDLs to develop and implement water quality management plans. [6]

Response 207-208: Please note that **Comment 207** concerns EPA’s review of the 2009 MS4 NJPDES permit and not the current permit. Regarding this subject MS4 NJPDES permit, additional measures and their relation to TMDLs are addressed in the NJPDES regulations at N.J.A.C. 7:14A-25.6(e)1.i which is stated as follows:

- (e) The permittee’s stormwater program shall include any additional measures (AMs) required under this subsection. AMs are non-numeric or numeric effluent limitations that are expressly required to be included in the stormwater program by an areawide or Statewide water quality management plan (WQM plan) adopted in accordance with N.J.A.C. 7:15. AMs may modify, or be in addition to, SBRs listed under (b) above.
 - 1. AMs may be adopted in an areawide or Statewide WQM plan before or after the Department issues the NJPDES permit. The Department shall provide written notice of the adoption of the AM to each permittee whose stormwater program must include that AM, and shall list each adopted AM in the permit when the permit is issued or in a minor modification to the permit. For AMs other than numeric effluent limitations, the areawide or Statewide WQM plan shall specify the BMPs that the permittee or another entity (see (a)3 above and N.J.A.C. 7:14A-25.8(e)) will implement, and the measurable goals for each of those BMPs. AMs may be required by:
 - i. A TMDL approved or established by USEPA, or an equivalent analysis that determines such AMs are needed to protect water quality;

Currently, the only TMDL that explicitly requires an additional measure is the “Total Maximum Daily Load Report for the Non-Tidal Passaic River Basin Addressing Phosphorous Impairments,” which required the adoption of fertilizer ordinances. This TMDL requirement was included in the 2009 Tier A MS4 NJPDES permit, but has since been superseded by the New Jersey Fertilizer Law. Therefore, there are currently no TMDLs that contain non-numeric or numeric effluent limitations that are expressly required to be included in the stormwater program. The terms and conditions in the Tier A MS4 NJPDES permit are therefore consistent with the federal requirement at 40 CFR 122.44(d)(1)(vii)(B). If Additional Measure(s) are required later under N.J.A.C. 7:14A-25.6(e), the Department has the authority to modify the permit pursuant to Part IV.D.1.b. Please refer to **Response 209** below for a specific example of how TMDLs address MS4 discharges.

While the Commenter 15 asserts that the Department did not follow EPA's instructions, please note that EPA did not include any comments on Part IV.C.2 but did comment on various other portions of the Tier A MS4 NJPDES permit.

No changes have been made to the final permit as a result of this comment.

209. **Comment:** Commenter 25 states that the draft permit does not require the implementation of reduction strategies set out in the TMDL itself. For example, the Raritan Basin TMDL provides for 84% reduction in total suspended solids (TSS) from urban runoff as well as from stormwater discharges into Carnegie Lake. While the guidance documents suggest that a permittee "adopt a stricter stormwater control ordinance" or "retrofit existing stormwater management facilities," the permit does not require the permittee to demonstrate it will take any actions to implement the TMDL or that its proposed actions will have any impact on reducing pollution loading. Commenter 25 states that stricter requirements for locales draining into a waterbody with a TMDL are required by 40 CFR 122.34(c)(1). In the absence of clear, stronger language requiring permittees to implement TMDLs, Commenter 25 states that the draft permit is insufficient to meet Clean Water Act requirements. [25]

Response 209: The Department disagrees that the Tier A MS4 NJPDES permit is insufficient in meeting the requirements of the Clean Water Act and maintains that the Tier A MS4 NJPDES permit is consistent with 40 CFR 122.34(c) as described in this comment. 40 CFR 122.34(c) states:

"c. Other applicable requirements. As appropriate, the permit will include:

- (1) More stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis, or where the Director determines such terms and conditions are needed to protect water quality.
- (2) Other applicable NPDES permit requirements, standards and conditions established in the individual or general permit, developed consistent with the provisions of 122.41 through 122.49." This standard allows the Department to determine what constitutes appropriate control measures."

As stated in various TMDL documents, proper implementation of the minimum requirements of the municipal stormwater program is generally expected to achieve a substantial portion of the required load reductions. Specifically, as stated in the "Total Maximum Daily Load Report for the Non-Tidal Raritan River Basin Addressing Total Phosphorus, Dissolved Oxygen, pH and Total Suspended Solids Impairments" which refers to the ambient monitoring program:

"...these same [Ambient Stream Monitoring Network] monitoring programs will continue and will be the primary basis to determine effectiveness in achieving the objectives of the TMDLs in attaining the SWQS following implementation."

Additionally, this TMDL states:

“The NJPDES rules for the Municipal Stormwater Regulation Program require municipalities, highway agencies, and regulated “public complexes” that operate “municipal separate storm sewer systems” (MS4s) to develop stormwater management programs for those MS4s consistent with the NJPDES permit requirements. Under these rules and associated general permits, Tier A municipalities are required to implement various control measures that should substantially reduce phosphorus loadings in the impaired watersheds. These control measures include adoption and enforcement of a pet waste disposal ordinance, prohibiting the feeding of unconfined wildlife on public property, street sweeping, cleaning catch basins, performing good housekeeping at maintenance yards, and providing related public education and employee training. These basic requirements will provide for a measure of load reduction from existing development. The Department is currently engaged in a number of efforts aimed at gauging the effectiveness of the existing MS4 program and identifying areas that could be improved through the annual report audit and in the process of renewing permits.”

In sum, the Department maintains that the conditions of the Tier A MS4 NJPDES permit are consistent with the direction provided in the TMDL documents.

No changes have been made to the final permit as a result of this comment.

210. **Comment:** Regarding Part IV.C.2, Commenter 15 states that numerous TMDLs have been developed for New Jersey waterbodies that assign wasteload allocations to urban stormwater, as evidenced by the results produced by the Department’s “TMDL Look-Up Tool” (see www.nj.gov/dep/dwq/msrp-tmdl-rh.htm). Yet none of these wasteload allocations have been implemented through enforceable permit requirements to date, nor would they be implemented during the next permit term under the proposed provisions. These TMDLs have been developed to restore waterbodies with documented impairments caused at least in part by stormwater. Commenter 15 contends that because the Department did not include any mandatory permit requirements to implement those TMDLs, this relegates those waters to at least another five years of continued degradation. As for impaired waters that lack TMDLs, the draft permit includes no proposed provisions addressing those impairments. The draft permit has neither a prohibition on discharges that cause or contribute to violations of water quality standards, nor effluent limitations demonstrated to be sufficient to ensure compliance with such standards.

Commenter 15 states that the Department cannot argue that meaningful water quality based effluent limitations are not needed either for TMDL or non-TMDL waters. Water quality continues to deteriorate through the state, and stormwater is a known cause of many impairments, as demonstrated by nearly every document in the permit’s administrative record. Commenter 15 states that stormwater is the known cause of at least one-third of the state’s impairments (942 out of 2,560 total assessment unit/pollutant combinations), and the number of stormwater-impaired waterways added to the list has grown by over 100 since the previous round of MS4s permits was issued. For example, the Navesink River’s water quality has continued to deteriorate despite the fact that the river’s 2006 bacteria TMDL specifically called on MS4

permit requirements to achieve pollution reductions (Five Total Maximum Daily Loads for Total Coliform to Address Shellfish-Impaired Waters in Watershed Management Area 12, Atlantic Coastal Water Region (2006), available at www.nj.gov/dep/wms/bear/coastal_pathogen_tmdls_wma12%20for%20adoption.pdf).

Commenter 15 continues by stating that in order to bring the permit into compliance with the Clean Water Act, the Department must include a prohibition on the discharge of pollutants in amounts that cause or contribute to violations of water quality standards. Commenter 15 states that the Department must incorporate pollution control measures demonstrated to ensure compliance with wasteload allocations and water quality standards whether they take the form of Additional Measures or other enforceable (not optional) requirements. Commenter 15 states that many other states around the country include such provisions in their small MS4 general permits, and there is no reason why New Jersey cannot follow their lead. Other states' permits also show the feasibility of including meaningful TMDL requirements even when TMDLs do not provide individualized wasteload allocations for specific MS4s. [15]

Response 210: Please refer to **Response 1** for overall improvements to the Tier A MS4 NJPDES permit. Please refer to **Response 15-16** regarding water quality based effluent limitations and available monitoring programs. Please refer to **Response 209** for an example as to how MS4s are addressed in TMDL documents.

211. **Comment:** Commenter 15 states that the proposed permit does not include water quality based effluent limitations as required by federal and state law. The Clean Water Act and implementing regulations require that all NPDES permits must include conditions adequate to “ensure compliance” with applicable water quality standards (40 CFR 122.4(d); see also 33 U.S.C. 1311(b)(1)(C), 1342(a)). The EPA’s Environmental Appeals Board has held that this requirement applies equally to MS4 permits (In re Government of the District of Columbia Municipal Separate Storm Sewer System, 10 E.A.D. 323, 329, 335- 43 (EAB 2002)). In accordance with this federal requirement, New Jersey regulations at N.J.A.C. 7:14A-25.6(a) confirm that NJPDES MS4 permits:

“...shall require at a minimum that the permittee develop, implement, and enforce a stormwater program designed to...satisfy the appropriate water quality requirements of the Federal Act and the State Act.”

State regulations at N.J.A.C. 7:14A-13.2(a)(2) also provide that all permits regulating discharges into surface water (including Tier B MS4 NJPDES permits):

“...shall include ... [w]ater quality based limitations ... when the Department has determined that the discharge causes, has the reasonable potential to cause, or contributes to an excursion above the SWQS [water quality standards].”

New Jersey’s Surface Water Quality Standards regulations at N.J.A.C. 7:9B-1.5(a)(6) provide:

“Existing uses shall be maintained and protected. Designated uses shall, as soon as technically and economically feasible, be attained wherever these uses are not precluded by natural conditions.”

Further, the regulations at N.J.A.C. 7:9B-1.5(d)(2)(iv) provide that:

“..[w]ater quality characteristics that are generally worse than the water quality criteria shall be improved to meet the water quality criteria.”

In addition, all NPDES permits must contain requirements “consistent with the assumptions and requirements of any available wasteload allocation” as per 40 CFR 122.44(d)(1)(vii)(B). Wasteload allocations represent the maximum amount of pollutant that a source (such as an MS4) can discharge into a water body each day and still attain water quality standards, in accordance with that water body’s total maximum daily load (TMDL) 33 U.S.C. § 1313; 40 CFR 130.2(h). Once a point source such as an MS4 is assigned a WLA, that WLA must be implemented through a NPDES permit (See *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) (“Once approved by EPA, TMDLs must be incorporated into permits.”)).

The EPA’s MS4 Permit Improvement Guide confirms:

“If there are waste load allocations (WLAs) applicable to the permittee, these should be addressed in the permit” (U.S. EPA, MS4 Permit Improvement Guide at 5).

A 2014 EPA policy memorandum addresses this obligation directly:

“[W]here a State or EPA has established a TMDL, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the WLAs in the TMDL. ... Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. For MS4 discharges, CWA section 402(p)(3)(B)(iii) provides flexibility for NPDES authorities to set appropriate deadlines for meeting WQBELs consistent with the requirements for compliance schedules in NPDES permits set forth in 40 CFR § 122.47. The permitting authority’s decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information. As discussed in the 2002 memorandum, the permit’s administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs.” (Memorandum from Andrew D. Sawyers, Director, Office of Wastewater Management, U.S. EPA, and Benita Best-Wong, Director, Office of Wetlands, Oceans and Watersheds, U.S. EPA, to Water Division Directors, EPA)

EPA re-stated these obligations directly to the Department in its 2014 memo reviewing the current 2009 permit. In that memo, EPA explicitly stated that the Department “must include water-quality based effluent limits in the MS4 general permits for MS4s with approved WLAs,” including Additional Measures identified in TMDLs (EPA Permit Review at 6). [15]

Response 211: The Department maintains that the requirements of Part IV.C.2 that pertain to TMDLs is consistent with state and federal regulations yet also cognizant of current resources, as described in **Response 206**. As discussed at length in **Response 15-16**, the Department disagrees that state and federal regulations require water quality based effluent limitations for stormwater discharges. In fact, several of the NJPDES citations referenced in **Comment 211** pertain to the NJPDES program in general which covers many types of wastewater discharges including those that are of a continuous discharge nature unlike stormwater. As described in these regulations, stormwater discharges are best addressed through SBRs and related best management practices and control measures that Tier A Municipalities are required to implement and are designed to minimize pollutant loadings. Subchapter 25 of the NJPDES Regulations at N.J.A.C. 7:14A is specific to the Municipal Stormwater Regulation Program where N.J.A.C. 7:14A-25.6 states:

“Best management practice (BMP) requirements are generally the most appropriate form of effluent limitations when designed to satisfy technology-based requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of BMPs (other than [Optional Measures]) consistent with the provisions of the stormwater program required pursuant to this section and the provisions of the NJPDES permit required pursuant to N.J.A.C. 7:14A-25.2(a) constitutes compliance with the standard of reducing pollutants to the maximum extent practicable.”

In the preamble to the Stormwater Phase II rules, EPA states that “permits would implement an iterative process using BMPs, assessment, and refocused BMPs, leading toward attainment of water quality standards.” In fact, as specifically noted in **Comment 211**:

“...The permitting authority’s decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.”

The inclusion of TMDL requirements and other improved BMPs in the Tier A MS4 NJPDES permit represents an iterative step and reasonable progress towards increased recharge, reduced flooding, and the reduction of the amount of pollutants discharged to the maximum extent practicable. The terms and conditions specified in the permit meet both the standard at 40 CFR 122.34 to “include terms and conditions that meet the requirements of this section based on its evaluation of the current permit requirements, record or permittee compliance, and program implementation progress, current water quality conditions, and other relevant information” and are based on “an analysis of the specific facts and circumstances surrounding the permit, and/or

the underlying WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.” As described in **Response 206**, the Department maintains that understanding which TMDLs apply to which waterbodies and providing strategies as suggested in TMDLs is the most important first step in addressing impairments.

Generally, WLAs are apportioned to the whole watershed within a TMDL document. Page 56 of the Fact Sheet explains that:

“For waterbodies with approved or adopted TMDLs, the reductions associated with compliant implementation of each SBR constitutes reasonable progress toward meeting the reductions specified in the TMDLs...These basic requirements provide for a measure of load reduction from existing development.”

This language in the Fact Sheet mirrors the assumptions explained in the TMDL documents. It is also important to note the assumptions in the TMDL documents that the minimum requirements of the Municipal Stormwater Program will be sufficient to implement the required reductions assumes that the permit requirements will be properly implemented. As stated on Page 14 of the draft Tier A MS4 NJPDES permit Fact Sheet:

“Continued efforts by the Department’s Municipal Stormwater Regulation Program, including review of Compliance Evaluations, Annual Reports and Certifications, and Supplemental Questionnaires; outreach efforts; and implementation of a municipal stormwater program audit process, constitute evaluation of the permit requirements and the progress of municipal stormwater programs.”

As a result of these efforts, the Department expects improved implementation of municipal stormwater programs and further reduction of pollutant discharges to all surface water bodies, including impaired waterbodies. In addition, the Tier A MS4 NJPDES permit includes improved permit conditions, including new training requirements, which are intended to help increase permit compliance and further reduce pollutant discharges. All of these conditions constitute mandatory requirements towards reducing pollutant discharges to water bodies with TMDLs.

No changes have been made to the final permit as a result of this comment.

212. **Comment:** Commenter 25 states that while Part IV.C.2 references TMDLs and suggests that a permittee considers TMDLs, this provision does not implement the requirements at 40 CFR 122.4 as applied to States, 40 CFR 123.25(a)(1). Commenter 25 states that a permitting agency may not issue a permit when "imposition of conditions cannot ensure compliance with the applicable water quality." N.J.A.C. 7:9B-1.5(d)(1) also prohibits the approval of a permit that continues the impairment of a water. [25]

Response 212: The Department disagrees with the interpretation in the comment above. The Federal Regulations at 40 CFR 122.4 state that no permit may be issued:

“...when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.”

N.J.A.C. 7:9B-1.5(d)(1), which represents the applicable water quality requirements, states:

“Existing uses shall be maintained and protected. Designated uses shall be maintained or, as soon as technically and economically feasible, be attained wherever these uses are not precluded by natural conditions.”

The Department believes that the conditions in the Tier A and Tier B MS4 permits constitute compliance with the federal requirement to reduce the discharge of pollutants to the maximum extent practicable. The iterative steps and reasonable progress shown in the Tier A and Tier B MS4 permits meet the federal requirement to increase recharge, reduce flooding, and reduce the amount pollutants discharged during storm events to the maximum extent practicable. As stated in various TMDL documents, proper implementation of the minimum control measures is generally expected to achieve the required load reductions. In addition, discharging stormwater from a small MS4 without a NJPDES permit is prohibited under the New Jersey Water Pollution Control Act. Therefore, the Department considers the Tier A and Tier B MS4 permits to be in full compliance with state and federal rules.

No changes have been made to the final permit as a result of this comment.

213. **Comment:** Commenter 15 states that the water quality based requirements that the Department has included in Part IV.C.2, in addition to being substantively deficient, are self-regulatory which violates the principles underlying the Ninth Circuit’s ruling and revised EPA rule. This is because the TMDL provisions in Part IV.C.2.a direct permittees to “identify and develop strategies” to address impairment-causing pollutants, without any associated measurable standards or a requirement for Department review and approval. As a result, Commenter 15 states that the TMDL requirements do not meet the standard for “clear, specific, measurable” permit conditions articulated in the Comprehensive General Permit approach, nor do they provide for permitting agency oversight as described in the Two-Step General Permit approach.

Commenter 15 suggests that the Department remedy this problem by applying the Two-Step General Permit approach for water quality based effluent limitations. This is the best choice since the needs of a particular waterbody can require additional water quality based effluent limitations tailored to particular MS4 dischargers, as in the case of TMDL-based requirements. However, strict procedural safeguards must be established to ensure that the permit does not create a self-regulatory scheme like that of the draft permit at issue here. Commenter 15 suggests that the Department incorporate procedural safeguards such as the requirement for MS4-developed plans (and their identified “strategies”) to be subject to public comment, an opportunity for a public hearing, and a full review and approval by the Department, with modifications to proposed plans as needed. [15]

Response 213: As noted previously, the NPDES MS4 General Permit Remand Rule at 40 CFR 122 became effective on January 9, 2017. As described on page 89325 under the “Summary of the Final Rule”:

“The final rule amends § 122.28(d) to require permitting authorities to choose one of these two types of general permits whenever issuing a small MS4 general permit. Permitting authorities are required to select either the “Comprehensive General Permit” or “Two-Step General Permit.” The “Comprehensive General Permit” is essentially the “Traditional General Permit,” or “Option 1,” from the proposed rule. The “Two-Step General Permit” encompasses both the “Procedural Approach,” or “Option 2” and the “hybrid approach” that was described as part of “Option 3” from the proposed rule. The Two-Step General Permit allows the permitting authority to establish some requirements in the general permit and others applicable to individual MS4s through a second proposal and public comment process.”

The Department has the authority to choose the best approach for the MS4 NJPDES permit. The Department maintains that the Comprehensive General Permit approach is the best choice as it is the most appropriate approach for meeting the requirements of the Clean Water Act as well as state and federal rules, while also considering the limited resources of Tier A Municipalities and the Department. The Department does not agree with the suggestion in this comment for “MS4-developed plans (and their identified “strategies”) to be subject to public comment, an opportunity for a public hearing, and a full review and approval by the Department, with modifications to proposed plans as needed.” The permit itself details the specific requirements municipalities are to implement to meet the six minimum controls and the SBRs. These specific requirements reduce discharges to the maximum extent practicable. The SPPP serves to document the implementation of the specific permit requirements. Furthermore, the permit already establishes certain safeguards—the Department has the authority to notify a municipality that the SPPP does not meet one or more of the minimum requirements and to require the municipality to address deficiencies. Under this renewal permit, the current SPPP is to be posted on the municipality’s website and updated annually.

The 9th Circuit, EDC, supra, 344 F.3d at 855, invalidated the procedure by which general permits were originally issued under the Phase II rule because that procedure potentially allowed for permits that would “do less than require controls to reduce discharge of pollutants to the maximum extent practicable.” The court also concluded that the Notices of Intent (NOIs) in the original permit process were “functionally equivalent” to the permit applications subject to the public availability and hearing requirements because the NOIs “contain[ed] the substantive information about how the operator of a small MS4 w[ould] reduce discharges to the maximum extent practicable.” Id. at 857. The permit’s SBR BMPs and other mandatory control measures satisfy the MEP standard. Part IV.C.2.a. requires municipalities, after reviewing the TMDL report, to identify and incorporate strategies in the SPPP as an Optional Measure to address specific sources of pollutants. N.J.A.C. 7:14A-25.6(a)1 states that “Implementation of BMPs (other than OMs) consistent with the provisions of the stormwater program required pursuant to this section and the provisions of the NJPDES permit required pursuant to N.J.A.C. 7:14A-25.2(a) constitutes compliance with the standard of reducing pollutants to the maximum extent practicable.” (emphasis added). Additionally, as the Department stated on page 56 of the Fact Sheet:

“Each SBR contains specific requirements, each of which is targeted at reducing the discharge of pollutants. For waterbodies with approved or adopted TMDLs, the reductions associated with compliant implementation of each SBR constitutes reasonable progress toward meeting the reductions specified in the TMDLs.”

Finally, the directive in Part IV.C.2.a.ii. to “identify and develop strategies” meets the standard for “clear, specific, measurable” permit conditions because it provides clear direction as to when and how the permittee must satisfy the requirement. All permittees must satisfy this requirement by EDPA + 12 months and update such information annually in the SPPP. The permit states that the “[s]trategies may include but are not limited to those found in the implementation section of approved or adopted TMDL reports.” This language reflects the Department’s responsibility to balance specificity and flexibility under the Phase II rule as the permitting authority. See 81 F.R. at 89336.

No changes have been made to the final permit as a result of this comment.

214. **Comment:** Part IV.C.2.a.i requires the annual review of approved or adopted TMDL reports to identify stormwater related pollutants listed therein and associated with any segment of surface water wholly or partially within or bordering the Tier A Municipality. Commenter 33 suggests that this condition to be changed to provide more definition including the phrase “...bordering, adjacent and nearby.” [33]

Response 214: Part IV.C.2.a.i is summarized in **Response 206** above. The intention of Part IV.C.2.a.i is to increase awareness of the existence and goals of TMDLs and to have Tier A Municipalities identify potential pollutant sources and develop strategies to reduce pollutant discharges to TMDL waterbodies. The Department’s TMDL Look-Up Tool identifies TMDL watersheds wholly or partially within or bordering the municipality and provides a link to the associated TMDL documents. Therefore, using the tool will allow municipalities to identify any TMDL waterbodies that are affected by stormwater discharges from the municipality.

The Department disagrees with the change to permit language suggested in this comment. This iteration of the permit does limit the permittee’s specific obligations to any segment of surface water wholly or partially within or bordering the Tier A Municipality. This is appropriate as the Department is issuing the permit to that specific municipality and not the neighboring municipalities. However, since TMDLs are issued on a watershed basis and waterways generally traverse through multiple municipalities, a TMDL that includes a waterway within a municipality is likely applicable to the municipality upstream or downstream of its border where the same permit condition will apply. As a result the neighboring municipality may be affected by the same TMDL and will identify such in its SPPP.

No changes have been made to the final permit as a result of this comment.

215. **Comment:** Regarding Part IV.C.2 and Attachment A, Commenter 27 suggests that the Department provide a number of examples of Optional Measures on their webpage. Commenter 27 also suggests that the Department add incentives under Optional Measures (Part IV.E) to

encourage municipalities that have watersheds with TMDLs to decrease stormwater volume. [27]

Response 215: Part IV.C.2.a.ii states that “Strategies may include but are not be limited those found in the implementation section of approved or adopted TMDL reports (for examples see “Total Maximum Daily Load (TMDL) Guidance for Tier A MS4 Permittees” found at www.nj.gov/dep/dwq/msrp-tmdl-rh.htm);...” As specifically identified in this requirement, examples of strategies are included in the “Total Maximum Daily Load (TMDL) Guidance for Tier A MS4 Permittees.” As described in **Response 206**, this document contains suggested strategies for addressing specific stormwater related pollutants which are commonly addressed in TMDLs and provides municipalities examples of strategies that can be incorporated as Optional Measures. Therefore, the permit already references a source that can be evaluated for potential Optional Measures as suggested in this comment.

Regarding the suggestion that the Department provide incentives for adopting Optional Measures, the Department disagrees that this is appropriate and is not consistent with state regulations. N.J.A.C. 7:14A-25.6(i) states:

“At the permittee’s discretion, and to the extent allowable under law, the stormwater program may also include optional measures (OMs), which are BMPs that are not implemented for SBRs or [Additional Measures] (or for other measures specified in the NJPDES permit), but that prevent or reduce the pollution of waters of the State. The SPPP shall specifically identify such BMPs (if any) as OMs, and identify actions to implement those OMs. Failure to implement an OM identified in the SPPP shall not be considered a violation of the NJPDES permit or this section.”

Because Optional Measures are adopted at the permittee’s discretion and are not used to meet the requirements in the SBRs or Additional Measures, the Tier A MS4 NJPDES permit cannot provide incentives for adopting Optional Measures.

No changes have been made to the final permit as a result of this comment.

216. **Comment:** Commenter 33 suggests that Part IV.C.2.a.ii be expanded to include all parts of the municipal system. Commenter 33 suggests the following changes:

“...and (2) identify and develop strategies to address and to eliminate specific sources of stormwater related pollutants contributing to discharges authorized under this Tier A MS4 NJPDES permit. Strategies ~~may~~ SHALL include but are not limited those found in the implementation section of approved or adopted TMDL reports...”

Commenter 33 states that the strategies need to be more general to include all sources, particularly illicit connections. [33]

Response 216: The Department is unclear as to what is intended by the suggestion that Part IV.C.2.a.ii needs to be expanded to include all parts of the municipal separate storm sewer system.

The Department also does not agree that adding the phrase “and to eliminate” and changing “strategies may include” to “strategies shall include” meets the goal of Part IV.C.2.a.ii of the Tier A MS4 NJPDES permit. By their nature, the sources of many stormwater related pollutants cannot be wholly eliminated. For example, pathogen inputs from wildlife can be addressed and reduced, but not eliminated. In addition, the standard is intended to provide Tier A Municipalities with the flexibility to identify the strategies that are best suited to their needs and resources. Requiring municipalities to eliminate sources of pollutants and to include all strategies listed in the guidance, rather than addressing only those which are of concern in the municipality, reduces municipalities’ flexibility to make cost effective decisions.

No changes have been made to the final permit as a result of this comment.

217. **Comment:** Regarding Part IV.C.2.a.iii, Commenter 18 suggests that the municipality should incorporate a final comprehensive set of strategies into its SPPP within five years. [18]

Response 217: Part IV.C.2.a.iii is stated as follows:

“iii. The Tier A Municipality shall annually update its SPPP to list information identified in i and ii, above;...”

The Department disagrees with requiring Tier A Municipalities to incorporate a “final comprehensive set of strategies” as suggested in this comment. Requiring Tier A Municipalities to annually update the SPPP to include information related to TMDLs, the prioritization of maintenance, and the strategies developed to address specific sources of stormwater related pollutants is an appropriate iterative step for this Tier A MS4 NJPDES permit. Note that the requirement to use TMDL information to assist in prioritizing stormwater facility maintenance is mandatory and therefore must be included in the SPPP. To further improvements beyond these requirements, Part IV.C.2.a.iv states that Tier A Municipalities can incorporate any strategies identified in Part IV.C.2.a.ii as Optional Measures. This is consistent with requirements at N.J.A.C. 7:14-25.6(i) which clearly states that the adoption of OMs are at the permittee’s discretion.

No changes have been made to the final permit as a result of this comment.

218. **Comment:** Regarding Part IV.C.2.a.iv, Commenter 18 questions if the optional measures in this section will become “required” measures by the Department in the next iteration of this draft permit if the ambient water quality in the impaired water body does not improve. Commenter 18 questions how the Department anticipates an iterative permitting path to improved water quality in TMDL waters. [18]

Response 218: The Department has not determined what permit conditions will be required by the next iteration of the Tier A MS4 NJPDES permit as this would be premature. As part of any renewal of this five year permit, the Department will utilize various sources of information to determine what meets the standard of maximum extent practicable for the next permit cycle. In addition to evaluating any regulations in effect at that time, the Department will also evaluate

Compliance Evaluations, Annual Reports and Certifications, Supplemental Questionnaires, outreach efforts, and municipal stormwater program audits. The Department may also evaluate the status of impaired waterways and any new or developing TMDLs. In doing so, the Department will meet the requirement in 40 CFR 122.34(a) to “include terms and conditions that meet the requirements of this section based on its evaluation of the current permit requirements, record or permittee compliance, and program implementation progress, current water quality conditions, and other relevant information.”

No changes have been made to the final permit as a result of this comment.

219. **Comment:** Regarding Part IV.C.2.a.iv which concerns the incorporation of “any” strategies identified in Part IV.C.2.a.ii, Commenter 33 suggests that the word “any” be deleted and replaced with “all.” [33]

Response 219: Part IV.C.2.a.iv is stated as follows:

“iv. The Tier A Municipality shall incorporate any strategies identified in ii(2), above as an Optional Measure. See Part IV.E (Optional Measures) and Part IV.F.1.c (SPPP).”

The Department disagrees with the suggestion to change “any” to “all,” Part IV.C.2.a.iv refers back to Part IV.C.2.a.ii(2) in which Tier A Municipalities are required to “...identify and develop strategies to address specific sources of stormwater related pollutants contributing to discharges authorized under this Tier A MS4 NJPDES permit.” The intention of the language in Part IV.C.2.a.iv is to convey that Tier A Municipalities are required to update their SPPP to incorporate only those strategies identified in Part IV.C.2.a.ii.(2). Part IV.C.2.a.iv purposefully does not refer to Part IV.C.2.a.ii(1), which states that Tier A Municipalities must use TMDL information to “assist in the prioritization of stormwater facility maintenance including schedules for repairs required at Part IV.B.6.b.iv (Stream Scouring) and IV.C.1.a.iv (Stormwater Facilities Maintenance), above...” The requirement to use TMDL information to assist in prioritizing stormwater facility maintenance is mandatory and therefore is not referenced in Part IV.C.2.a.iv, which is related to Optional Measures. The Department maintains that this suggested change is not consistent with the Department’s intent for this requirement.

No changes have been made to the final permit as a result of this comment.

Part IV.D, Additional Measures

- D.1 Incorporation of Additional Measures (Tier A MS4 NJPDES Permit)
- C.1 Incorporation of Additional Measures (Tier B MS4 NJPDES Permit)

220. **Comment:** Commenter 18 notes that the Department indicates in Part IV.D that Additional Measures will be included in the Tier A MS4 NJPDES permit through a minor modification. Because Additional Measures are “non-numeric (e.g. best management practices) or numeric effluent limitations that are expressly required to be included in a Tier A Municipality’s MS4 stormwater program by a TMDL; a regional stormwater management plan; other elements of an adopted areawide Water Quality Management Plan; or the adopted Statewide Water Quality

Management Plan,” pursuant to 40 CFR 122.63, incorporation of additional measures is not a minor modification. Therefore, incorporation of additional measures must be consistent with 40 CFR 122.62 and Part 124, including notice and comment. [18]

Response 220: Part IV.D.1.b is stated as follows:

“b. The Department will provide written notice of the adoption of any Additional Measure(s) to any affected Tier A Municipality. The Department will list each adopted Additional Measure in a minor modification to the Tier A MS4 NJPDES permit. For any required Additional Measure(s) other than numeric effluent limitations, the required Additional Measure(s) will specify the best management practices that shall be implemented and the measurable goals. The required Additional Measure(s) will also specify the implementation schedule.”

This permit condition is in the NJPDES Regulations for the Municipal Stormwater Program at N.J.A.C. 7:14A-25.6(e)1 which states:

“1. AMs [Additional Measures] may be adopted in an areawide or Statewide WQM plan before or after the Department issues the NJPDES permit. The Department shall provide written notice of the adoption of the AM to each permittee whose stormwater program must include that AM, and shall list each adopted AM in the permit when the permit is issued or in a minor modification to the permit. For AMs other than numeric effluent limitations, the areawide or Statewide WQM plan shall specify the BMPs that the permittee or another entity...will implement, and the measurable goals for each of those BMPs...”

Based on the above, the Tier A MS4 NJPDES permit is consistent with the NJPDES Regulations where it is specifically stated that Additional Measures can be issued as minor modifications to the Tier A MS4 NJPDES permit. However, note that municipalities and the general public do have an opportunity to review and comment on areawide or Statewide WQM plans as part of that separate public process.

No changes have been made to the final permit as a result of this comment.

221. **Comment:** Commenter 33 notes that Part IV.D indicates that non-numeric Additional Measures (e.g., best management practices) or numeric effluent limitations may be expressly required in a Tier A Municipality’s regional stormwater management plan; other elements of an adopted areawide Water Quality Management Plan; or the adopted Statewide Water Quality Management Plan. Commenter 33 questions if any of these plans as referenced in this condition exist. Additionally, Commenter 33 states that it is unclear if municipalities can act on their own or if only the Department can act. [33]

Response 221: The plans referenced in Part IV.D do indeed exist. In accordance with the Water Quality Management Planning Act and Section 208 of the Clean Water Act, there are twelve areawide Water Quality Management Planning Areas in New Jersey. Information regarding the areawide plans can be found at www.nj.gov/dep/wqmp/wqmps.html. In addition, there are

various adopted and approved TMDLs, which can be found at www.state.nj.us/dep/wms/bears/tmdls.html. Municipalities alone can only develop their own Municipal Stormwater Management Plan. However, a municipality can participate as a stakeholder in the development and implementation of a regional stormwater management plan. A regional stormwater management plan must be developed in accordance with N.J.A.C. 7:8-3.

No changes have been made to the final permit as a result of this comment.

Part IV.E, Optional Measures

- E.1 Incorporation of Optional Measures (Tier A MS4 NJPDES Permit)
- E.2 Refuse Container /Dumpster Ordinance (Tier A MS4 NJPDES Permit only)
- D.1 Incorporation of Optional Measures (Tier B MS4 NJPDES Permit)

222. **Comment:** Part IV.E.1.c concerns the incorporation of Optional Measures. Commenter 33 suggests deletion of this condition and contends that if a municipality opts in then they must be required to implement the Optional Measure(s). [33]

Response 222: Part IV.E.1.c is stated as follows:

“c. Failure to implement an Optional Measure identified in the SPPP shall not be considered a violation of the NJPDES permit.”

The Department maintains that the permit condition as written is consistent with N.J.A.C. 7:14A-25.6(a)3 and 25.6(a)3.i regarding Optional Measures. The permit condition as written is also consistent with the recently issued National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule at 40 CFR 122 (see FR 237, December 9, 2016 at www.gpo.gov/fdsys/pkg/FR-2016-12-09/pdf/2016-28426.pdf). In the preamble at Section VI.(B) on page 89335, the following is stated:

“Permitting authorities may find it helpful to their permittees to include guidance language within their permits in order to provide suggestions to their permittees, and it may be included. However, guidance language phrased as suggested guidelines would not qualify as an enforceable permit requirement under the final rule.”

Additionally, each cycle of the permit must continue to demonstrate iterative progress towards enhancing water quality as stated on page 89338 in the preamble of this rule (which references the proposed rule):

“A foundational principle of MS4 permits is that from permit term to permit term iterative progress will be made towards meeting water quality objectives, and that adjustments in the form of modified permit requirements will be made where necessary to reflect current water quality conditions, BMP effectiveness, and other current relevant information.”

Including the opportunity for a municipality to include Optional Measures in the SPPP, without risking a violation of the NJPDES permit for failing to implement one or more of those identified Optional Measures, is consistent with the concept of iterative progress identified above. Additionally, the objective of Optional Measures is to encourage municipalities to be proactive and creative in employing implementation strategies.

No changes have been made to the final permit as a result of this comment.

223. **Comment:** Regarding Part IV.E.2.a, Commenter 18 states that it is not clear in the permit that a Tier A Municipality is required to either implement and enforce the Refuse Container/Dumpster Ordinance. Additionally, Commenter 18 states that it is not clear in the permit that a Tier A Municipality is required to clean storm drain inlets or catch basins as frequently as necessary to eliminate recurring problems and restore proper function due to uncovered refuse containers that are outdoors or exposed to stormwater. Further, Part IV.B.5.b.ii. does not mention that storm drain inlets or catch basins must be cleaned more frequently, as necessary, to eliminate recurring problems and restore proper function “due, in this case, to uncovered refuse containers that are outdoors or exposed to stormwater.”

Because one of these options must be implemented, Commenter 18 states that it is confusing to have the Refuse Container/Dumpster Ordinance as an “Optional Measure.” Additionally, it is not clear in Part IV.B.5.b that Tier A Municipalities that do not opt to implement and enforce the Refuse Container/Dumpster Ordinance must clean storm drain inlets or catch basins more frequently as necessary to eliminate recurring problems and restore proper function “due, in this case, to uncovered refuse containers that are outdoors or exposed to stormwater.” Therefore, Commenter 18 suggests that the Refuse Container/Dumpster Ordinance provision be moved to Part IV.B.5.b Community Wide Measures within the Statewide Basic Requirement for Pollution Prevention/Good Housekeeping.

Commenter 18 suggests that this condition be included under a separate community wide measure that can be met by choosing between two options: implementation and enforcement of the Refuse Container/Dumpster Ordinance, or, cleaning storm drain inlets or catch basins as frequently as necessary to eliminate recurring problems and restore proper function due to uncovered refuse containers that are outdoors or exposed to stormwater. Commenter 18 further suggests that the Department choose a clear, specific and measurable goal with respect to the option to clean storm drain inlets or catch basins by identifying the specific increased frequency for the cleaning. [18]

Response 223: The Department disagrees with this comment. The Refuse Container/Dumpster Ordinance was developed by the Department and was incorporated into the previous iteration of the Tier A MS4 NJPDES permit. However, there is no federal statute, rule, guidance, or comparable requirement for statewide MS4 permits to implement a Container/Dumpster Ordinance. As stated in the Fact Sheet on page 60:

“Specifically, Tier A Municipalities have the option of adopting and enforcing an ordinance requiring dumpsters and other refuse containers that are outdoors or exposed to stormwater to

be covered at all times. According to Annual Reports submitted by Tier A Municipalities for the 2015 reporting year, 434 of New Jersey's 457 year 2009 Tier A permittees adopted a Refuse Container/Dumpster Ordinance. Since this ordinance serves to prohibit the spilling, dumping, leaking, or otherwise discharge of liquids, semi-liquids or solids from the containers, those municipalities that are not maintaining this ordinance must instead, as required at Part IV.B.5.b.ii (Catch Basin and Storm Drain Inlet Inspection and Cleaning), clean any municipally owned or operated storm drain inlet or catch basin more frequently, as necessary, to eliminate recurring problems and restore proper function due, in this case, to uncovered refuse containers that are outdoors or exposed to stormwater."

For this reason, the requirement of the 2009 Tier A MS4 NJPDES permit to enforce ordinances relating to dumpsters and refuse containers was found by New Jersey's Council on Local Mandates to be an unfunded mandate in 2011 as described in **Response 27-28**. Therefore, this condition was moved to Part IV.E.2, Optional Measures, of the Tier A MS4 NJPDES permit in recognition that an overwhelming majority of municipalities have already chosen to adopt the Container/Dumpster Ordinance. Municipalities who have adopted the Container/Dumpster Ordinance may still choose to enforce the ordinance but will not receive any violations if it is not enforced.

In response to the suggestion to include a higher frequency of storm drain inlet cleaning for municipalities without a Container/Dumpster Ordinance, note that Tier A Municipalities are already required to clean storm drain inlets and basins as frequently as necessary to eliminate recurring problems and restore proper function pursuant to Part IV.B.5.b.ii of the Tier A MS4 NJPDES permit. At a minimum, Tier A Municipalities are required to inspect and clean all storm drain inlets and associated catch basins at a minimum of once every five years to remove sediment, trash, and other debris. Therefore, this suggested change is unnecessary.

No changes have been made to the final permit as a result of this comment.

224. **Comment:** Commenter 15 states that at Part IV.E.2 the draft Tier A permit proposes to make the refuse/dumpster ordinance optional, when in the 2009 permit it was mandatory for permittees to adopt. Weakening this requirement violates the MEP standard because the adoption of these ordinances was deemed practicable in the previous permit and because the Department has not explained why it is not also practicable during this permit term. If the Department's reason for removing this mandatory requirement is that it could constitute an unfunded mandate, we maintain that state law provisions cannot interfere with a NPDES delegated state's duty to carry out federal law. [15]

Response 224: The Department disagrees with this comment. A summary of the Department's position regarding the inclusion of this condition as an optional measure is included in the previous response. The Council of Local mandates voided the Refuse Container/Dumpster Ordinance in a Written Opinion issued December 21, 2011, and in that written opinion, the Council of Local Mandates wrote:

“The Council accordingly holds that (1) the N.J.A.C. 7:14A-15.15 directive concerning the adoption and enforcement of the dumpster-cover ordinance is declared to be an unfunded mandate...”

The original intent of the Refuse Container/Dumpster ordinance was to keep liquids (from leaking dumpsters) and solids and floatables (from uncovered dumpsters) from entering the MS4 via the storm drain inlets. The Tier A MS4 NJPDES permit strengthens the illicit connection inspection frequency at Part IV.B.6.c.i since it requires the conduct of visual inspections of outfall pipes at least once every five years to determine if a dry weather flow or other evidence of illicit discharge is present. Similarly, the Tier A MS4 NJPDES permit strengthens the catch basin and inlet inspection program at Part IV.B.5.b.ii since it requires the Tier A Municipality to clean and municipally owned or operated storm drain inlet or catch basins as frequently as necessary to eliminate problems and restore function.

No changes have been made to the final permit as a result of this comment.

225. **Comment:** Regarding optional measures, Commenter 22 does not object to Part IV.C.2 so long as Part IV.C.2.a.iv continues to refer to the “strategies” developed in response to Part IV.C.2.a.ii as Optional Measures. However, if the Department were to instead make these “strategies” mandatory, then Commenter 22 would raise objections related to the following examples:

- (i) use of TMDL reports that are “approved” but not “adopted” (see N.J.A.C. 7:15-6.4(b)2, which identifies TMDL document “adoption” as “final agency action”);
- (ii) conflict with “implementation plans” in existing adopted TMDL documents (see N.J.A.C. 7:15-6.3(b)6); and
- (iii) the need for direct Department and public participation in establishing mandatory NJPDES permit control measures.

In addition, Part IV.E, Optional Measures, should be expanded to include a reference to Part IV.C.2. [22]

Response 225: The Department acknowledges the commenter’s support for the language in the draft Tier A MS4 NJPDES permit and the Department is not suggesting any changes to Part IV.C.2.a.iv in this final permit. As explained in the Fact Sheet:

“Optional Measures are required to be identified in the SPPP but failure to implement an Optional Measure identified in the SPPP shall not be considered a violation of this NJPDES permit.”

Therefore, any strategies identified under Part IV.C.2.a.ii as Optional Measures are not intended to be mandatory which is consistent with the commenter’s suggestion.

Regarding the second portion of this comment, the Department disagrees that Part IV.E Optional Measures should be expanded to include a reference to Part IV.C.2. Part IV.C.2.a.iv includes

the statement “Please see Part IV.E (Optional Measures) and Part IV.F.1.c (SPPP), below” to ensure that permittees understand the connection between these two sections. Therefore, the existing language is sufficient to convey a cross reference to Part IV.E.

No changes have been made to the final permit as a result of this comment.

Part IV.F, Stormwater Pollution Prevention Plan (SPPP)

- F. Stormwater Pollution Prevention Plan (Tier A MS4 NJPDES Permit)
- F. Implementation of Stormwater Program Conditions through Shared or Contracted Services (Tier B MS4 NJPDES Permit)

226. **Comment:** Commenter 33 states that the term “Stormwater Coordinator” should be replaced with “Stormwater Program Coordinator” in Parts IV.F.1.b, Part IV.F.1.c.ii, Part IV.F.2.a, Part IV.F.2.b and Part IV.G.1.b to ensure consistency throughout the document. [33]

Response 226: The 2009 Tier A MS4 NJPDES permit gives a brief overview of the basic duties of the Municipal Stormwater Program Coordinator. The 2017 Tier A and Tier B MS4 NJPDES permits expand on those basic duties by defining the qualifications and detailing the responsibilities of the Municipal Stormwater Program Coordinator. For simplicity, the abbreviation “Stormwater Coordinator” was used in place of the full title in the draft Tier A and Tier B MS4 NJPDES permits.

However, the Department agrees with the change suggested in this comment. For clarity and consistency, “Municipal Stormwater Program Coordinator (Stormwater Coordinator)” will be used in pertinent section headers to indicate the use of the abbreviation in the accompanying text, and the abbreviation “Stormwater Coordinator” will be used consistently. The specific text modified in the final Tier A MS4 NJPDES permit for each applicable permit condition is described as follows:

Part IV.F.1.a.i is amended to read, “Identifies the person designated as the Municipal Stormwater Program Coordinator (Stormwater Coordinator) per Part IV.F.2, below, and the members of the SPPP Team.”

Part IV.F.1.b is amended to read, “The Tier A Municipality’s ~~Municipal Stormwater Program~~ Coordinator shall sign and date the SPPP per Part IV.F.3 (~~Stormwater Coordinator~~), below.”

Part IV.F.3 is amended to read, “Responsibilities of the Municipal Stormwater Program Coordinator (Stormwater Coordinator).”

Part IV.F.3.a is amended to read, “The Tier A Municipality shall designate a Municipal Stormwater Program Coordinator (Stormwater Coordinator). The Stormwater Coordinator is responsible for:”

The specific text modified in the final Tier B MS4 NJPDES permit for each applicable permit condition is described as follows:

Part IV.G.1.b is amended to read, “The Municipal Stormwater Program Coordinator (Stormwater Coordinator) shall certify, sign and date the Annual Report.”

Changes have been made to the final Tier A and Tier B MS4 NJPDES permits as a result of this comment.

227. **Comment:** Commenter 10 states that the proposed Tier B MS4 NJPDES permit renewal establishes a new requirement that the Stormwater Coordinator must be a “principal executive officer” or a “ranking elected official.” Commenter 10 states it may be beneficial to provide a definition for these terms or provide a cross-reference to another portion of the State Code that defines these terms. [10]

Response 227: While Commenter 10 has specified that his comments pertain to the Tier B MS4 permit (NJ0141861) only, the Department notes that the Stormwater Coordinator requirements for the Tier B MS4 NJPDES permit are included in Part IV.E.1. This response is written to clarify the Stormwater Coordinator requirements for both the Tier A and Tier B MS4 NJPDES permits.

The Tier A MS4 NJPDES permit Part IV.F.2 and the Tier B MS4 NJPDES permit Part IV.E.1 specify that the Stormwater Coordinator must be a “principal executive officer” or a “ranking elected official.” In general, a principal executive officer is an individual who has been delegated powers by the governing individual or body to execute specific tasks in pursuit of an objective. A ranking elected official can be understood to be an official selected by a democratic-electoral process to a position empowered to complete tasks, delegate responsibilities, and/or expend resources on behalf of the electorate (the municipality). As discussed in the Tier A MS4 NJPDES permit Fact Sheet (Section 8.A.2) and the Tier B MS4 NJPDES permit Fact Sheet (Section 8.A.1) the Stormwater Coordinator is either a principal executive officer or a ranking elected official of a municipality as required at N.J.A.C. 7:14A-4.9(a)3. Municipal officials may assign this responsibility to a person that is already responsible for overall municipal stormwater facilities or municipal environmental matters as allowed at N.J.A.C. 7:14A-4.9(b).

No changes have been made to the final permits as a result of this comment.

228. **Comment:** Commenter 11 states that the “General” portion on page 1 of Attachment A states that “[t]he The SPPP shall be updated as required by Part IV.F.1.c, above” whereas Part IV.F.1.c makes reference to “as often as needed.” Commenter 11 asks that the Department clarify what “as often as needed” means in that sentence. [11]

Response 228: In Attachment A, under the “General” header, the third paragraph down states that “The SPPP shall be updated as required by Part IV.F.1.c, above.” Part IV.F.1.c states “The

Tier A Municipality shall review the SPPP at least annually and update it as often as necessary to reflect changes related to the municipality's Tier A MS4 Stormwater Program.”

When the municipality makes changes to its stormwater program, these changes need to be documented in the written SPPP to ensure that the plan is kept up-to-date. Programmatic changes, and stormwater program components that are specifically required by the permit to be reviewed and updated annually, may be made following the annual review (e.g. updates to the outfall pipe map; incorporation of TMDL Information and any Optional Measures added to the SPPP).

Other more routine changes should be made to the SPPP at the time that changes are made to the municipality's stormwater program. For example, the SPPP should be updated at the time that changes are made to the members of the SPPP Team. Also, the SPPP should be updated whenever the permit requires the municipality to notify the Department of any change (e.g. reappointment of Municipal Stormwater Program Coordinator; amendment of the SPPP after notification by the Department that minimum requirements have not been met). Since the MSWMP is a significant component of the SPPP (see Part IV.A.2.b), the SPPP is updated “as often as necessary” when the MSWMP is updated as part of the reexamination of the municipal master plan. Finally, throughout the permit and as itemized in Attachments A and A-1, certain records are required to be kept, or their location referenced in, the SPPP. Records that are kept must be updated in the SPPP as compliant activities occur (e.g. records demonstrating compliance with Employee Training programs must kept be current in the SPPP as training is completed). In sum, the Department maintains that Part IV.F is clear as written and is supported by Attachment A and A-1.

No changes were made to the final permit as a result of this comment.

229. **Comment:** Regarding Part IV.F.2.b, Commenter 18 suggests that the Stormwater Coordinator role be occupied by a Professional Engineer (P.E.); or that Stormwater Coordinators be required to attend annual training pertaining to the Tier A MS4 NJPDES permit as well as stormwater system technical operation and maintenance. Commenter 18 states that in order to better coordinate the permittee's implementation of the SPPP and Tier A MS4 NJPDES permit conditions (Part IV.F.3.a.i.), the Stormwater Coordinator should understand the basic fundamentals of hydrology and hydraulics, along with how stormwater BMPs are operated and maintained. [18]

Response 229: The Department disagrees with the suggestion that the Municipal Stormwater Coordinator roles should be occupied by a professional engineer or that additional training be required. The primary role of Stormwater Coordinator is to ensure effective implementation of the municipal stormwater program. The implementation of technical aspects of the program is generally accomplished by a wide range of municipal employees, such as the municipal engineer or Department of Public Works personnel. In order to augment these responsibilities, Part IV.B.5.d of the Tier A MS4 NJPDES permit already requires regular training for municipal employees on those stormwater topics applicable to their title and duties. This training is intended to ensure that all municipal employees that are responsible for implementing aspects of

the municipal stormwater program have an understanding of stormwater concepts and relevant best management practices.

No changes have been made to the final permits as a result of this comment.

230. **Comment:** Commenter 22 states that in Part IV.F.3.a.i (Responsibilities of the Municipal Stormwater Program Coordinator), the responsibility for “coordinating the permittee’s implementation of the SPPP and Tier A MS4 NJPDES permit conditions” is unreasonable. This is due to the fact that no single municipal officer or official has legal authority to, for example, issue binding commands to the municipal governing body in regard to adopting municipal ordinances or the municipal budget. To remedy this problem, Commenter 22 suggests that Part IV.F.3.a.i be modified to something like “encouraging coordinated implementation by the permittee of the SPPP and Tier A MS4 NJPDES permit conditions.”

Commenter 22 submits the same comment for Part IV.E.2.a.i on the Tier B MS4 NJPDES permit. [22]

Response 230: The Department disagrees with this suggested change. The Responsibilities of the Municipal Stormwater Program Coordinator (Stormwater Coordinator) is outlined in Part IV.F.3.a.i of the Tier A MS4 NJPDES permit and Part IV.E.2.a of the Tier B MS4 NJPDES permit. As described in these sections, the role of Stormwater Coordinator is primarily to ensure effective implementation of the municipal stormwater program. SPPP team members can come from various departments or agencies within the municipality. The Stormwater Coordinator coordinates the implementation of the SPPP and the permit conditions to comply with the Tier A or Tier B MS4 NJPDES permit and it would be inappropriate and confusing to not designate a specific person for this role. In addition, to “coordinate” does not imply that the Stormwater Coordinator has the authority to direct the municipality to implement the SPPP and permit conditions. The implementation of technical aspects of the program is generally accomplished by a wide range of municipal employees, such as the municipal engineer or Department of Public Works personnel. The municipality and its governing body are ultimately responsible for complying with the permit.

No changes have been made to the final permit as a result of this comment.

231. **Comment:** Commenter 33 suggests that Part IV.F.4.a.i be changed to add “Best Management Practice or” before the word control measure(s). Similarly, Commenter 33 suggests that “Best Management Practice” be added after particular in Part IV.F.4.a.ii. [33]

Response 231: The Department agrees with these comments and has incorporated these changes for clarity and consistency. Modified text is as follows:

“i. The other entity implements the best management practice(s) or control measure(s);”

“ii. The particular best management practice(s) or control measure(s), or component(s) thereof, is at least as stringent or as frequent as the corresponding NJPDES permit requirement;”

This change affects Part IV.F.4.a.i and ii of the final Tier A and Tier B MS4 NJPDES permits.

232. **Comment:** Regarding Part IV.F.4.b, Commenter 18 states that in the case where a contractor is hired to maintain a stormwater BMP, without proper maintenance technique knowledge/training, either damage can occur to the BMP or future hydraulics can be compromised. This is of particular concern in the case of green infrastructure and proprietary devices/systems. Commenter 18 recommends that such contractors be required to show they obtain regular training on performing maintenance duties, and moreover, physically meet with proprietary product manufactures to discuss maintenance before commencing thereby protecting a municipality’s investments. [18]

Response 232: The Department disagrees with this comment. The Tier A MS4 NJPDES permit at Part IV.F.4.b states that stormwater facility maintenance must be performed to “ensure the proper function and operation of the stormwater facility.” In the case where a contractor is hired to maintain a stormwater facility, it is the responsibility of the owner and/or operator of the stormwater facility to ensure that maintenance is performed properly. Allowing maintenance activities that damage or compromise the hydraulics of the stormwater facility to be conducted would not meet the requirement to ensure the proper function and operation of the stormwater facility.

No changes have been made to the final permits as a result of this comment.

Part IV.G, Annual Report and Certification

G. Annual Report and Certification (Tier A and B MS4 NJPDES Permits)

233. **Comment:** Regarding Part IV.G.1.a, Commenter 15 recognizes that the Department is barred from requesting a new RFA form from existing permittees when a permit is renewed as per N.J.A.C. 7:14A-25.4(a)(3). However, Commenter 15 asserts that there are important reasons to request updated information from permittees who have not submitted an RFA to the Department in the past eight years since the 2009 permits were issued. Commenter 15 suggests that the Department use the first Annual Report as an opportunity to collect such information. For example, the Department should require permittees’ first Annual Report under the new permit to provide a heightened level of detail about compliance with new permit provisions which they are implementing for the first time. Additionally, the Department should require the Annual Report to update the potentially outdated contact information from the previously submitted RFA. [15]

Response 233: The Department appreciates the suggestions for the Annual Report for the Tier A MS4 NJPDES permit. Note that Annual Reports are submitted through the NJDEP Online Portal and does allow for personal information to be added. As a result, contact information is routinely updated on an annual basis.

Regarding the suggestion that permittees' first Annual Report provide a heightened level of detail about compliance with new permit provisions, please note that the Annual Report is not specifically part of the Tier A MS4 NJPDES permit and is not under revision at this time. As a result, the Department cannot specifically comment on the suggested changes to the Annual Report document.

No changes have been made to the final permits as a result of this comment.

234. **Comment:** Commenter 33 suggests that the words "and public" be added to Part IV.G.1.d so that the Annual Report and Certification is available to the public in a central location. [33]

Response 234: The Annual Report and Certification is a public record. OPRA procedures are already in place and allow the ability for the public to access municipal documents on an as needed basis. As a result, it is not necessary to add the words "and public" to Part IV.G.1.d of the Tier A and Tier B MS4 NJPDES permits.

No changes have been made to the final permits as a result of this comment.

Acronyms Used in Response to Comments Document

5G3	General Stormwater permit-Construction Activity
AM	Additional Measures
APP	Application
BMP	Best Management Practices
CFR	Code of Federal Register
CSO	Combined Sewer Overflows
CSS	Combined Sewer System
CWA	Clean Water Act
DGW	Discharge to Ground Water
DSW	Discharge to Surface Water
EDC	Environmental Defense Center
EDPA	Effective Date of Permit Authorization
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FR	Federal Register
GI	Green Infrastructure
GIS	Geographical Information Systems
GPS	Global Positioning System
MEP	Maximum Extent Practicable
MLUL	Municipal Land Use Law
MM	Millimeter
MMY	Municipal Maintenance Yard
MS4	Municipal Separate Storm Sewer Systems
MSWMP	Municipal Stormwater Management Plan
MUA	Municipal Utility Authority
NJAC	New Jersey Administrative Code
NJDEP	New Jersey Department of Environmental Protection (the Department)
NJPDES	New Jersey Pollutant Discharge Elimination System
NJPO	New Jersey Planning Officials
NJSA	New Jersey Statutes Annotated
NJSWQS	New Jersey Surface Water Quality Standards
NOI	Notice of Intent
NPDES	National Pollution Discharge Elimination System
NRC	National Research Council
OM	Optional Measures
OPRA	Open Public Records Act
PCB	Polychlorinated Biphenyls
PL	Public Law
RFA	Request for Authorization
RSIS	Residential Site Improvement Standards
SBR	Statewide Basic Requirements
SCO	Stormwater Control Ordinance
SIIA	Sewage Infrastructure Improvement Act

SMA	Stormwater Management Act
SPPP	Stormwater Pollution Prevention Plan
SWMP	Stormwater Management Program
TMDL	Total maximum daily load
TSS	Total Suspended Solids
USC	United States Code
USGS	United States Geological Survey
WLA	Wasteload Allocation
WPCA	Water Pollution Control Act
WQBELS	Water Quality Based Effluent Limitations



State of New Jersey

CHRIS CHRISTIE
Governor

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Mail Code – 401-02B
Division of Water Quality
P.O. Box 420
Trenton, NJ 08625-0420
Phone: (609) 633-7021 / Fax: (609) 984-7938

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

Stormwater Program Coordinator, Lebanon Borough
6 High Street
Lebanon, New Jersey 08833

May 15, 2017

Dear Lebanon Borough Stormwater Program Coordinator:

Lebanon Borough is subject to compliance with New Jersey's Municipal Stormwater Regulation Program. Under this program, Lebanon Borough holds a Municipal Separate Storm Sewer System (MS4) permit that requires Lebanon Borough to have a system of oversight in place to ensure adequate long-term operation and maintenance of stormwater facilities approved but **not owned or operated by** Lebanon Borough. Stormwater facilities include stormwater management basins.

Oversight includes periodic inspection of stormwater facilities and review of operation and maintenance records kept by the owner; including inspection logs, maintenance records, and stormwater facility location information. As necessary, Lebanon Borough may take enforcement measures in accordance with municipal ordinances.

The system of oversight is effected by the implementation of local ordinances which are required by the MS4 permit and supported by the legal authority derived from applicable state and federal laws and regulations, such as the Federal Clean Water Act, NJ Water Pollution Control Act, NJ Stormwater Management Act, New Jersey Pollutant Discharge Elimination System Rules, and New Jersey Stormwater Management rules. Lebanon Borough's system of oversight requires collaboration with the owners or operators of stormwater facilities. This letter may be distributed to owners or operators as part of Lebanon Borough's outreach and implementation of the MS4 permit conditions.

Additional information regarding the Municipal Stormwater Management Program can be found at www.nj.gov/dep/dwq/fd.htm. You can also contact your MS4 case manager for guidance. Case manager contact information is posted at www.nj.gov/dep/dwq/msrp_managers.htm.

If you would like to discuss this matter, please contact your case manager or myself at the Bureau of Nonpoint Pollution Control at (609) 633-7021.

Sincerely,

A handwritten signature in black ink, appearing to read "James J. Murphy".

James J. Murphy, Chief
Bureau of Nonpoint Pollution Control